

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 9 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Thalya Joy Hellard,

Plaintiff,

Case No. 95-C-1186-BU

vs.

AFFILIATED FOOD STORES, INC.,  
an Oklahoma corporation;  
JAMES LEE PIKE, JR., a  
minor, and MICHAEL WAYNE  
PIKE, JR., a minor,

Defendants.

APR 10 1996

ORDER AND JUDGMENT

This matter comes before the Court upon the Motion for Judgment on the Pleadings filed by Plaintiff, Thalya Joy Hellard, wherein Plaintiff seeks judgment against Defendants, James Lee Pike, Jr. and Michael Wayne Pike, on the basis that there are no facts in dispute in this litigation and that Plaintiff is entitled to judgment as a matter of law. In the motion, Plaintiff specifically asserts that judgment is appropriate as the Answer of the Guardian Ad Litem of James Lee Pike, Jr. and Michael Wayne Pike, denies that Defendants, James Lee Pike, Jr. and Michael Wayne Pike, claim any interest in the funds at issue in this case and further disclaims any interest in the funds by Laura Ann Pike, as guardian ad litem for Defendants, James Lee Pike, Jr. and Michael Wayne Pike.

The Court file reflects that Defendants, James Lee Pike, Jr. and Michael Wayne Pike, have not responded to Plaintiff's motion within the time prescribed by Local Rule 7.1(C). Pursuant to Local Rule 7.1(C), the Court deems the motion confessed. Having independently reviewed the motion, the Court finds that

the motion should be granted.

IT IS THEREFORE ORDERED that

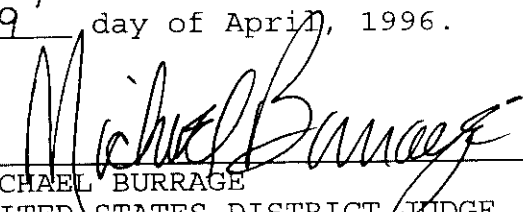
1. Plaintiff, Thalya Joy Hellard's Motion for Judgment on the Pleadings (Docket Entry #20) is GRANTED;

2. Judgment is entered in favor of Plaintiff, Thalya Joy Hellard, against Defendants, James Lee Pike, Jr. and Michael Wayne Pike;

3. Plaintiff, Thalya Joy Hellard, is entitled to the funds paid into the Court Registry by Defendant, Affiliated Food Stores, Inc., and any interest accrued thereon, less the appropriate Registry Fee.

4. The Court Clerk is directed to pay over to Plaintiff, Thalya Joy Hellard, the funds paid into the Court Registry by Defendant, Affiliated Food Stores, Inc., and any interest accrued thereon, less the appropriate Registry Fee.

DATED at Tulsa, Oklahoma, this 9<sup>th</sup> day of April, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE 4-10-96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RANDOLPH JOHN AMEN,  
Plaintiff,

v.

UNITED STATES of AMERICA,  
Defendant.

Case No. 95-C-0004-HV

**FILED**

APR 9 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge (Docket # 63) (regarding Defendant's Motion to Dismiss (Docket # 32)) and Plaintiff's Objection to Report and Recommendation of the Magistrate Judge (Docket # 64).


When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Based on a review of the Report and Recommendation of the Magistrate Judge and the Objection thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge granting Defendant's Motion to Dismiss (Docket # 32).

IT IS SO ORDERED.

This 8th day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

FILED ON DOCKET  
DATE 4-10-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 9 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM,  
INC., an Oklahoma corporation,

Plaintiff,

vs.

ACME AUTO LEASING  
ASSOCIATES OF HARTFORD  
COUNTY, INC., a Connecticut  
corporation, CLEMENT BRANCALE,  
an individual, and JOHN CULLEN, an  
individual,

Defendants.

Case No. **96C**

**270H** ✓

**TEMPORARY RESTRAINING ORDER**

Plaintiff Thrifty Rent-A-Car System, Inc. ("Thrifty") has moved, pursuant to Fed.R.Civ.P. 65, for a Temporary Restraining Order to enjoin Defendants from transferring, assigning, leasing, selling, renting, damaging or otherwise disposing of the vehicles or removing them from their present locations at: 75 Turnpike Road, Windsor Locks, Connecticut; 50 Morgan Street, East Hartford, Connecticut; Brainard APO/AIR One TRM, Hartford, Connecticut; and 100 Berlin Ave, Cromwell, Connecticut (the "Premises"), pending a hearing on Thrifty's Motion for a Preliminary Injunction.

The Court finds that it clearly appears ~~from~~ Thrifty's evidence that Thrifty will be irreparably injured by Defendants' removal or disposal of the vehicles from the Premises. Thrifty has made a prima facie showing that Defendants have breached the Master Lease Agreement and Courtesy

Vehicle License Agreement by failing to comply with their obligations therein, that Thrifty has properly terminated the Lease Agreements and has a right to repossess the vehicle from Defendants. Thrifty has made a prima facie showing that Thrifty will succeed on the merits of this action, will be irreparably harmed if a Temporary Restraining Order is not issued, that Defendants will not suffer irreparable injury, and that the public interest favors the imposition of such a Temporary Restraining Order.

Thrifty has further made a prima facie showing that Defendants' counsel was notified that this hearing was to occur on this date at such time as was convenient to the Court.

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the Defendants, their agents, servants, and all other persons acting by and under their authority or in concert with them are restrained from transferring, assigning, selling, leasing, renting, damaging, removing, or otherwise disposing of the vehicles described in Exhibit "A" attached hereto, from the Premises, such restraining order to remain in full force and effect until the 19<sup>TH</sup> day of APRIL, 1996, at 2 o'clock P.M., at which time Defendants will be given an opportunity to show cause why the foregoing restraining order should not be made a preliminary injunction, in the Courtroom of the Honorable SEAN PATRICK HOLMES.

This Temporary Restraining Order is issued at 1:40 o'clock P.M. on the 9<sup>TH</sup> day of APRIL, 1996.

  
UNITED STATES DISTRICT COURT

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04/08/96

VCICP440

COMPANY NO. 15, ACTIVE UNIT:

THRIFTY RENT-A-CAR SYSTEM,  
VEHICLE INVENTORY REPORT  
LICENSEE/UNIT NO. SEQ.

#09

	CUST	UNIT	PGM	MODEL	VOMNO	LSE	SERIAL	MILES	DELV DATE
4									
5	070103	GC259669	46	PPL44	RT259669	1	3P3AF28 K200259669	0	03019
6	070103	JN237245	14	PDH24	V2211205	2	103BS44 EXJN237245	0	05033
7	070103	KN519528	06	PPH44	WT188307	1	1P3CP48 D9KN519528	0	10098
8	070103	KN523357	06	PPH44	WT188407	1	1P3CP48 D6KN523357	0	10168
9	070103	KR115966	37	SKH52	JP021701	1	2B4EK15 KCKR115966	0	09016
10	070103	NHA75002	80	SAVAN	NHA75002	1	1FDJE57 G5NHA75002	0	11039
11	070103	RF303990	46	JCH27	K9407301	3	1C3EU45 35RF303990	0	05315
12	070103	RHA62012	80	SAVAN	2HA62012	1	1FDJE57 HXRHA62012	0	11149
13	070103	RR823937	46	SKH52	K8926801	2	2B4GH45 RORR323937	0	07069
14	070103	SD169891	08	LDH42	VE160501	1	1B3ES47 C9SD169891	0	11039
15	070103	SD169892	08	LDH42	VE160502	1	1B3ES47 C0SD169892	0	11039
16	070103	SD169893	08	LDH42	VE160503	1	1B3ES47 C2SD169893	0	11069
17	070103	SD169894	08	LDH42	VE160601	1	1B3ES47 C4SD169894	0	11059
18	070103	SD169895	08	LDH42	VE160602	1	1B3ES47 C6SD169895	0	11059
19	070103	SD169896	08	LDH42	VE160603	1	1B3ES47 C8SD169896	0	11039
20	070103	SD169897	08	LDH42	VE160801	1	1B3ES47 CXSD169897	0	11069
21	070103	SD169898	08	LDH42	VE160802	1	1B3ES47 C1SD169898	0	11059
22	070103	SD170767	08	LPH42	VE173401	1	1P3ES47 C4SD170767	0	11059
23	070103	SD170768	08	LPH42	VE173402	1	1P3ES47 C6SD170768	0	11120
24	070103	SD170769	08	LPH42	VE173403	1	1P3ES47 C8SD170769	0	11069
25	070103	SD170770	08	LPH42	VE173801	1	1P3ES47 C4SD170770	0	11069
26	070103	SD170771	08	LPH42	VE173802	1	1P3ES47 C6SD170771	0	11200
	070103	SD170772	08	LPH42	VE173803	1	1P3ES47 C8SD170772	0	11069
	070103	SD170773	08	LPH42	VE174301	1	1P3ES47 CXSD170773	0	11069
29	070103	SD170774	08	LPH42	VE174302	1	1P3ES47 C1SD170774	0	11069
30	070103	SD553252	46	LPL42	K9321602	2	1P3ES27 C9SD553252	0	04120
31	070103	SF510991	08	APH41	V6054003	1	1P3AA46 32SF510991	0	08199
32	070103	SF566511	08	ADH41	VE172701	1	1B3AA46 KXS566511	0	11180
33	070103	SF566519	08	APH41	VE180601	1	1P3AA46 K9SF566519	0	11140
34	070103	SF608698	01	HLP41	VE133301	1	1C3HD56 T1SF608698	0	01270
35	070103	SF608701	01	HLP41	VE138701	1	1C3HD56 T8SF608701	0	01260
36	070103	SF624225	01	HDH41	VE144301	1	1B3HD46 F9SF624225	0	02220
37	070103	SF624250	05	HDH41	VE145101	1	1B3HD46 F2SF624250	0	03060
38	070103	SF624251	01	HDH41	VE145201	1	1B3HD46 F4SF624251	0	02240
39	070103	SF624252	01	HDH41	VE145301	1	1B3HD46 F6SF624252	0	02240
40	070103	SF624253	01	HDH41	VE146302	1	1B3HD46 F0SF624253	0	02240
41	070103	SF624430	01	HLP41	VE142601	1	1C3HD56 T6SF624430	0	02240
42	070103	SH627019	01	HCH41	VE137201	1	2C3HC46 F5SH627019	0	01130
43	070103	SH627056	01	HCH41	VE139801	1	2C3HC46 F2SH627056	0	02100
44	070103	SH631459	01	HCH41	VE141401	1	2C3HC46 F2SH631459	0	02100
45	070103	SH637112	01	HDH41	VE145801	1	2B3HD46 T3SH637112	0	02100
46	070103	SH637120	01	HDH41	VE145802	1	2B3HD46 T4SH637120	0	03100
47	070103	SH637123	86	HDH41	VE146402	1	2B3HD46 F7SH637123	0	03100
48	070103	SH637304	01	HLP41	VE142102	1	2C3HC46 T2SH637304	0	02100
49	070103	SH640421	01	HCH41	VE141501	1	2C3HC46 F0SH640421	0	03000
50	070103	SH640423	01	HCH41	VE141701	1	2C3HC46 F4SH640423	0	03100
51	070103	SK533908	11	B3L13	VD475202	1	2B7K831 Z4SK533908	0	12100
	070103	SK533910	11	B3L13	VD475204	1	2B7K831 Z2SK533910	0	12300

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04/08/96  
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THRIFTY RENT-A-CAR SYSTEM,  
VEHICLE INVENTORY REPORT  
LICENSEE/UNIT NO. SEQ.

COMPANY NO. 15, ACTIVE UNITS

CUST	UNIT	PGM	MODEL	VONNO	LSE	SERIAL	MILES	DEL DATE
070103	SK540392	11	B3L13	VD475901	1	287K831 Z8SK540392	0	01309
070103	SK540393	11	B3L13	VD475902	1	287K831 Z8SK540393	0	01299
070103	SK540394	11	B3L13	VD475903	1	287K831 Z1SK540394	0	02059
070103	SK540395	11	B3L13	VD475904	1	287K831 Z3SK540395	0	02029
070103	SK540396	11	B3L13	VD475905	1	287K831 Z5SK540396	0	01309
070103	SK555608	11	B3L13	VD476002	1	287K831 Z3SK555608	0	03139
070103	SK555609	11	B3L13	VD476003	1	287K831 Z5SK555609	0	03109
070103	SK555610	11	B3L13	VD476004	1	287K831 Z1SK555610	0	03129
070103	SL598639	01	JJL74	VD477101	1	1J4FJ58 S8SL598639	0	02109
070103	SL598640	01	JJL74	VD477201	1	1J4FJ58 S4SL598640	0	02099
070103	SL598641	01	JJL74	VD477301	1	1J4FJ58 S6SL598641	0	02179
070103	SL614928	01	JJL74	VD477401	1	1J4FJ58 S9SL614928	0	03169
070103	SL617650	01	JJL74	VD477501	1	1J4FJ58 S5SL617650	0	03169
070103	SR263770	01	SHH52	VD477801	1	2P4GH45 R2SR263770	0	01219
070103	SR306639	01	SHH52	VD513902	1	2P4GH45 R5SR306639	0	03099
070103	SR307455	01	SKH52	VD517604	1	2B4GH45 38SR307455	0	03109
070103	SR307458	01	SKH52	VD517702	1	2B4GH45 33SR307458	0	03009
070103	SR314482	01	SHH52	VD473901	1	2P4GH45 34SR314482	0	03129
070103	SR315957	01	SKH52	VD473401	1	2B4GH45 36SR315957	0	03129
070103	ST503358	08	ADH41	VE043902	1	3B3AA46 K5ST503358	0	09029
070103	ST508363	08	ADH41	VE044203	1	3B3AA46 K9ST508363	0	09079
070103	ST508364	08	ADH41	VE044204	1	3B3AA46 K0ST508364	0	09119
070103	ST509846	08	ADH41	VE053801	1	3P3AA46 K3ST509846	0	09119
070103	ST516211	08	APH41	VE054403	1	3P3AA46 K6ST516211	0	09099
070103	ST516212	08	APH41	VE054404	1	3P3AA46 K8ST516212	0	09099
070103	ST549195	08	LDH42	VE160001	1	3B3ES47 C2ST549195	0	11039
070103	ST549196	08	LDH42	VE160002	1	3B3ES47 C4ST549196	0	11039
070103	ST549197	08	LDH42	VE160101	1	3B3ES47 C6ST549197	0	11199
070103	ST549198	08	LDH42	VE160102	1	3B3ES47 C8ST549198	0	11139
070103	ST549199	08	LDH42	VE160201	1	3B3ES47 CXST549199	0	11199
070103	ST549200	08	LDH42	VE160202	1	3B3ES47 C2ST549200	0	11209
070103	ST549201	08	LDH42	VE160301	1	3B3ES47 C4ST549201	0	11199
070103	ST549202	08	LDH42	VE160302	1	3B3ES47 C6ST549202	0	11139
070103	ST549203	08	LDH42	VE160303	1	3B3ES47 C8ST549203	0	11139
070103	ST549204	08	LDH42	VE160401	1	3B3ES47 CXST549204	0	11199
070103	ST549205	08	LDH42	VE160402	1	3B3ES47 C1ST549205	0	11219
070103	ST549206	08	LDH42	VE160403	1	3B3ES47 C3ST549206	0	11199
070103	ST549207	08	LDH42	VE160701	1	3B3ES47 C5ST549207	0	11199
070103	ST549208	08	LDH42	VE160702	1	3B3ES47 C7ST549208	0	11209
070103	ST549209	08	LDH42	VE160901	1	3B3ES47 C9ST549209	0	11139
070103	ST549210	08	LDH42	VE160902	1	3B3ES47 C5ST549210	0	11209
070103	ST549211	08	LDH42	VE160903	1	3B3ES47 C7ST549211	0	11209
070103	ST549212	08	LDH42	VE160904	1	3B3ES47 C9ST549212	0	11209
070103	ST549213	08	LDH42	VE160905	1	3B3ES47 C0ST549213	0	11209
070103	ST549214	08	LDH42	VE161001	1	3B3ES47 C2ST549214	0	11209
070103	ST549215	08	LDH42	VE161002	1	3B3ES47 C4ST549215	0	11209
070103	ST549216	08	LDH42	VE161003	1	3B3ES47 C6ST549216	0	11139
070103	ST549790	08	LPH42	VE173501	1	3P3ES47 C7ST549790	0	11129

04/08/96  
VCICP440

THRIFTY RENT-A-CAR SYSTEM,  
VEHICLE INVENTORY REPORT  
LICENSEE/UNIT NO. SEQ.

COMPANY NO. 45 ACTIVE UNITS

	CUST	UNIT	PGM	MODEL	VONNO	LSE	SERIAL	MILES	DELTA DATE
5	070103	ST549791	08	LPH42	VE173502	1	3P3ES47 C9ST549791	0	11129
6	070103	ST549792	08	LPH42	VE173503	1	3P3ES47 CCST549792	0	11129
7	070103	ST549793	08	LPH42	VE173504	1	3P3ES47 C2ST549793	0	11129
8	070103	ST549794	08	LPH42	VE173505	1	3P3ES47 C4ST549794	0	11129
9	070103	ST549795	08	LPH42	VE173506	1	3P3ES47 C6ST549795	0	11129
10	070103	ST549796	08	LPH42	VE173507	1	3P3ES47 C8ST549796	0	11129
11	070103	ST549797	08	LPH42	VE173508	1	3P3ES47 CXST549797	0	11129
12	070103	ST549799	08	LPH42	VE173509	1	3P3ES47 C3ST549799	0	11129
13	070103	ST549800	08	LPH42	VE173703	1	3P3ES47 C6ST549800	0	11139
14	070103	ST549801	08	LPH42	VE173901	1	3P3ES47 C8ST549801	0	11139
15	070103	ST549802	08	LPH42	VE173902	1	3P3ES47 CXST549802	0	11139
16	070103	ST549803	08	LPH42	VE173903	1	3P3ES47 C1ST549803	0	11139
17	070103	ST549804	08	LPH42	VE174001	1	3P3ES47 C3ST549804	0	11139
18	070103	ST549805	08	LPH42	VE174002	1	3P3ES47 C5ST549805	0	11139
19	070103	ST549806	08	LPH42	VE174101	1	3P3ES47 C7ST549806	0	11139
20	070103	ST549807	08	LPH42	VE174102	1	3P3ES47 C9ST549807	0	11139
21	070103	ST549808	08	LPH42	VE174201	1	3P3ES47 CCST549808	0	11139
22	070103	ST549809	08	LPH42	VE174202	1	3P3ES47 C2ST549809	0	11139
23	070103	ST549810	08	LPH42	VE174401	1	3P3ES47 C9ST549810	0	11139
24	070103	ST549811	08	LPH42	VE174402	1	3P3ES47 CCST549811	0	11139
25	070103	ST557651	08	ADH41	VE172801	1	3B3AA46 K6ST557651	0	1208
26	070103	ST557652	08	ADH41	VE172901	1	3B3AA46 K8ST557652	0	1208
27	070103	ST557653	08	ADH41	VE173001	1	3B3AA46 KXST557653	0	1225
28	070103	ST557654	08	ADH41	VE175101	1	3B3AA46 K1ST557654	0	1222
29	070103	ST558536	08	APH41	VE180701	1	3P3AA46 K2ST558536	0	1218
30	070103	ST558537	08	APH41	VE180801	1	3P3AA46 K4ST558537	0	1205
31	070103	ST558538	08	APH41	VE180901	1	3P3AA46 K6ST558538	0	1223
32	070103	ST558539	08	APH41	VE181001	1	3P3AA46 K8ST558539	0	1223
33	070103	SX591092	08	SDH53	VK107502	1	1B4GK44 R2SX591092	0	0108
34	070103	SX591093	08	SDH53	VK107601	1	1B4GK44 R4SX591093	0	0106
35	070103	SX591094	08	SDH53	VK107602	1	1B4GK44 R6SX591094	0	0103
36	070103	SX591095	08	SDH53	VK107702	1	1B4GK44 R8SX591095	0	0108
37	070103	SX596202	08	SPH53	VK121801	1	1P4GK44 R1SX596202	0	0106
38	070103	SX596203	08	SPH53	VK121802	1	1P4GK44 R3SX596203	0	0112
39	070103	SX596204	08	SPH53	VK121803	1	1P4GK44 R5SX596204	0	1231
40	070103	SX596205	08	SPH53	VK121804	1	1P4GK44 R7SX596205	0	0109
41	070103	SX596206	08	SPH53	VK121901	1	1P4GK44 R9SX596206	0	0112
42	070103	SX607825	08	SHH53	VD472201	1	1P4GH44 R6SX607825	0	0112
43	070103	SX607826	08	SHH53	VD472202	1	1P4GH44 R8SX607826	0	0112
44	070103	SX607842	08	SHH53	VD480003	1	1P4GH44 R6SX607842	0	1223
45	070103	SX607843	08	SHH53	VD480004	1	1P4GH44 R8SX607843	0	1225
46	070103	SX608706	08	SKH53	VD474103	1	1B4GH44 R1SX608706	0	1224
47	070103	SX608707	08	SKH53	VD474104	1	1B4GH44 R3SX608707	0	1221
48	070103	SX608708	08	SKH53	VD474201	1	1B4GH44 R5SX608708	0	0121
49	070103	SX608709	08	SKH53	VD474202	1	1B4GH44 R7SX608709	0	0121
50	070103	SX608711	08	SKH53	VD474302	1	1B4GH44 R9SX608711	0	0108
51	070103	SX608715	08	SKH53	VD474502	1	1B4GH44 R2SX608715	0	1221
	070103	SX608718	08	SKH53	VD474701	1	1B4GH44 R8SX608718	0	1221

04/03/96

VCICP443

THIRTY RENT-A-CAR SYSTEM

VEHICLE INVENTORY REPORT

LICENSEE/UNIT NO. SEQ.

COMPANY NO. 45, ACTIVE UNITS

CUST	UNIT	PGM	MODEL	VINNO	LSE	SERIAL	MILES	DELV DATE
070103	SX608719	08	SKH53	VD474702	1	1B4GH44 R5SX608719	0	12229
070103	SX608720	08	SKH53	VD474703	1	1B4GH44 R6SX608720	0	12230
070103	SX619752	08	SHH53	VK194201	1	1P4GH44 R5SX619752	0	01129
070103	SX619754	08	SHH53	VK194401	1	1P4GH44 R3SX619754	0	01159
070103	SX619755	08	SHH53	VK194501	1	1P4GH44 R5SX619755	0	01149
070103	SX619756	08	SHH53	VK194601	1	1P4GH44 R7SX619756	0	01129
070103	SX619905	08	SHH53	VK229901	1	1P4GH44 R9SX619905	0	01069
070103	SX619906	08	SHH53	VK230001	1	1P4GH44 R0SX619906	0	01069
070103	SX619907	08	SHH53	VK230101	1	1P4GH44 R2SX619907	0	01089
070103	SX619908	08	SHH53	VK230102	1	1P4GH44 R4SX619908	0	01069
070103	SX619909	08	SHH53	VK230201	1	1P4GH44 R6SX619909	0	01069
070103	SX620325	08	SKH53	VK193501	1	1B4GH44 R3SX620325	0	01129
070103	SX620326	08	SKH53	VK193601	1	1B4GH44 R7SX620326	0	01129
070103	SX620327	08	SKH53	VK193701	1	1B4GH44 R9SX620327	0	01149
070103	SX620328	08	SKH53	VK193801	1	1B4GH44 R0SX620328	0	01219
070103	SX620329	08	SKH53	VK193901	1	1B4GH44 R2SX620329	0	01139
070103	TB264455	03	NHH52	TD413801	1	1P4GP45 R3TB264455	0	10209
070103	TB264456	03	NHH52	TD413802	1	1P4GP45 R5TB264456	0	11169
070103	TB264457	03	NHH52	TD413901	1	1P4GP45 R7TB264457	0	11169
070103	TB264458	03	NHH52	TD413902	1	1P4GP45 R9TB264458	0	11099
070103	TB264460	03	NHH52	TD414002	1	1P4GP45 R7TB264460	0	11169
070103	TB264461	03	NHH52	TD414003	1	1P4GP45 R9TB264461	0	10289
070103	TB275453	03	NHH52	TD414101	1	1P4GP45 R9TB275453	0	11069
070103	TB275459	03	NHH52	TD414102	1	1P4GP45 R0TB275459	0	11059
070103	TB275460	03	NHH52	TD414201	1	1P4GP45 R7TB275460	0	11099
070103	TB275461	03	NHH52	TD414202	1	1P4GP45 R9TB275461	0	10289
070103	TB275462	03	NHH52	TD414203	1	1P4GP45 R0TB275462	0	11059
070103	TB275463	03	NHH52	TD414301	1	1P4GP45 R2TB275463	0	10309
070103	TB275464	03	NHH52	TD414302	1	1P4GP45 R4TB275464	0	11059
070103	TB275465	03	NHH52	TD414401	1	1P4GP45 R6TB275465	0	10299
070103	TB275467	03	NHH52	TD414601	1	1P4GP45 RXTB275467	0	11069
070103	TB275468	03	NHH52	TD414602	1	1P4GP45 R1TB275468	0	10309
070103	TB275469	03	NHH52	TD414603	1	1P4GP45 R3TB275469	0	11029
070103	TB275470	03	NHH52	TD414604	1	1P4GP45 RXTB275470	0	11049
070103	TB283183	03	NHH52	CP003069	1	1P4GP45 R3TB283183	0	11179
070103	TB289011	08	NHH53	TD417301	1	1P4GP44 R2TB289011	0	12199
070103	TB289012	08	NHH53	TD417302	1	1P4GP44 R4TB289012	0	11309
070103	TB289013	08	NHH53	TD417303	1	1P4GP44 R6TB289013	0	12009
070103	TB289014	08	NHH53	TD417401	1	1P4GP44 R8TB289014	0	12009
070103	TB289015	08	NHH53	TD417402	1	1P4GP44 RXTB289015	0	11309
070103	TB289016	08	NHH53	TD417403	1	1P4GP44 R1TB289016	0	12009
070103	TB289017	08	NHH53	TD417501	1	1P4GP44 R3TB289017	0	12009
070103	TB289018	08	NHH53	TD417502	1	1P4GP44 R5TB289018	0	12009
070103	TB289019	08	NHH53	TD417601	1	1P4GP44 R7TB289019	0	12009
070103	TB289020	08	NHH53	TD417602	1	1P4GP44 R9TB289020	0	12009
070103	TB289021	08	NHH53	TD417701	1	1P4GP44 R5TB289021	0	12009
070103	TB289022	08	NHH53	TD417702	1	1P4GP44 R7TB289022	0	12199
070103	TB289023	08	NHH53	TD417801	1	1P4GP44 R9TB289023	0	12009

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COMPANY NO. 45, ACTIVE UNITS

THRIFTY RENT-A-CAR SYSTEM,

VEHICLE INVENTORY REPORT

LICENSEE/UNIT NO. SEQ.

	CUST	UNIT	PGM	MODEL	VONNO	LSE	SERIAL	MILES	DELV DATE
5	070103	TB289024	08	NHH53	TD417931	1	1P4GP44 RCTB289024	0	12019
6	070103	TB289025	08	NHH53	TD417932	1	1P4GP44 R2TB289025	0	12030
7	070103	TB289026	08	NHH53	TD418001	1	1P4GP44 R4TB289026	0	12039
8	070103	TB289027	08	NHH53	TD418002	1	1P4GP44 R6TB289027	0	12089
9	070103	TB289028	08	NHH53	TD418003	1	1P4GP44 R8TB289028	0	12020
10	070103	TB289029	08	NHH53	TD418004	1	1P4GP44 RXTB289029	0	12010
11	070103	TB289030	08	NHH53	TD418005	1	1P4GP44 R6TB289030	0	12070
12	070103	TB289400	08	NHH53	TD418006	1	1P4GP45 R4TB289400	0	11130
13	070103	TD519563	08	LPH42	TA321101	1	1P3ES47 C1TD519563	0	10100
14	070103	TD519564	08	LPH42	TA321102	1	1P3ES47 C3TD519564	0	10100
15	070103	TD519565	08	LPH42	TA321103	1	1P3ES47 C5TD519565	0	10100
16	070103	TD519566	08	LPH42	TA321301	1	1P3ES47 C7TD519566	0	10100
17	070103	TD519567	08	LPH42	TA321501	1	1P3ES47 C9TD519567	0	10100
18	070103	TD519568	08	LPH42	TA321502	1	1P3ES47 C0TD519568	0	10100
19	070103	TD519569	08	LPH42	TA321503	1	1P3ES47 C2TD519569	0	10100
20	070103	TD519570	08	LPH42	TA321504	1	1P3ES47 C9TD519570	0	10100
21	070103	TD519571	08	LPH42	TA321505	1	1P3ES47 C0TD519571	0	10100
22	070103	TD555689	08	LDH42	TA873401	1	1B3ES47 C3TD555689	0	11120
23	070103	TD555690	08	LDH42	TA873501	1	1B3ES47 CXTD555690	0	11120
24	070103	TD555691	08	LDH42	TA873601	1	1B3ES47 C1TD555691	0	11120
25	070103	TD555692	08	LDH42	TA873701	1	1B3ES47 C3TD555692	0	11160
26	070103	TD555693	08	LDH42	TA873801	1	1B3ES47 C5TD555693	0	11160
27	070103	TD555694	08	LDH42	TA873901	1	1B3ES47 C7TD555694	0	11160
28	070103	TD555695	08	LDH42	TA873902	1	1B3ES47 C9TD555695	0	11130
29	070103	TD555696	08	LDH42	TA873903	1	1B3ES47 C0TD555696	0	11130
30	070103	TD555697	08	LDH42	TA873904	1	1B3ES47 C2TD555697	0	11160
31	070103	TD555698	08	LDH42	TA874001	1	1B3ES47 C4TD555698	0	01050
32	070103	TD555699	08	LDH42	TA874002	1	1B3ES47 C6TD555699	0	11130
33	070103	TD555700	08	LDH42	TA874003	1	1B3ES47 C8TD555700	0	11130
34	070103	TD555701	08	LDH42	TA874101	1	1B3ES47 C0TD555701	0	11160
35	070103	TD555702	08	LDH42	TA874102	1	1B3ES47 C2TD555702	0	11160
36	070103	TF117620	03	HDH41	TA886701	1	1B3HD46 F4TF117620	0	11200
37	070103	TF117627	03	HDH41	TA886801	1	1B3HD46 F6TF117627	0	10200
38	070103	TF117628	03	HDH41	TA886901	1	1B3HD46 F8TF117628	0	11100
39	070103	TF117629	03	HDH41	TA887001	1	1B3HD46 FXTF117629	0	10200
40	070103	TF117630	03	HDH41	TA887201	1	1B3HD46 F6TF117630	0	10200
41	070103	TF117631	03	HDH41	TA887202	1	1B3HD46 F8TF117631	0	10200
42	070103	TF117632	03	HDH41	TA887301	1	1B3HD46 FXTF117632	0	10200
43	070103	TF117633	03	HDH41	TA887302	1	1B3HD46 F1TF117633	0	11100
44	070103	TF117634	03	HDH41	TA888001	1	1B3HD46 F3TF117634	0	11100
45	070103	TF120191	02	HDH41	TA891501	1	1B3HD46 FXTF120191	0	11200
46	070103	TF120192	02	HDH41	TA891502	1	1B3HD46 F1TF120192	0	11200
47	070103	TF120193	02	HDH41	TA891503	1	1B3HD46 F3TF120193	0	11200
48	070103	TF120194	02	HDH41	TA891504	1	1B3HD46 F5TF120194	0	11200
49	070103	TF120195	02	HDH41	TA891505	1	1B3HD46 F7TF120195	0	11200
50	070103	TF120196	02	HDH41	TA891506	1	1B3HD46 F9TF120196	0	11200
51	070103	TF120197	02	HDH41	TA891507	1	1B3HD46 F0TF120197	0	12200
	070103	TF120198	02	HDH41	TA891508	1	1B3HD46 F2TF120198	0	11200

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COMPANY NO. 45, ACTIVE UNITS

THRIFTY RENT-A-CAR SYSTEM,  
VEHICLE INVENTORY REPORT  
LICENSEE/UNIT NO. SEQ.

	CUST	UNIT	PGM	MODEL	VONNO	LSE	SERIAL	MILES	DELTA
4									
5	070103	TF120199	02	HDH41	TA891901	1	1B3HD46 F4TF120199	0	1113
6	070103	TF120200	02	HDH41	TA892001	1	1B3HD46 F7TF120200	0	1120
7	070103	TF120201	02	HDH41	TA892101	1	1B3HD46 F9TF120201	0	1123
8	070103	TH140020	03	HDH41	TA890001	1	1B3HD46 F6TF140020	0	1114
9	070103	TH161662	02	HDH41	TA891301	1	2B3HD46 FXTM161662	0	1114
10	070103	TH161663	02	HDH41	TA891401	1	2B3HD46 F1TH161663	0	1119
11	070103	TH227950	03	HDH41	TA890001	1	2B3HD46 F0TH227950	0	1120
12	070103	TH227959	03	HDH41	TA890001	1	2B3HD46 F0TH227959	0	1120
13	070103	TK118539	03	B3L53	TD411301	1	2B5WB35 Z9TK118539	0	1128
14	070103	TK118540	03	B3L53	TD411401	1	2B5WB35 Z5TK118540	0	1128
15	070103	TK118541	03	B3L53	TD411501	1	2B5WB35 Z7TK118541	0	1130
16	070103	TK118542	03	B3L53	TD411701	1	2B5WB35 Z9TK118542	0	1201
17	070103	TK124917	03	B3L53	TD411601	1	2B5WB35 Z1TK124917	0	1214
18	070103	TK124918	03	B3L53	TD411801	1	2B7KB31 Z9TK124918	0	1214
19	070103	TK124920	03	B3L53	TD411803	1	2B7KB31 Z7TK124920	0	1210
20	070103	TN162313	03	JDH41	TA887101	1	1B3EJ46 X7TN162313	0	1104
21	070103	TN162314	03	JDH41	TA887401	1	1B3EJ46 X9TN162314	0	1123
22	070103	TN162315	03	JDH41	TA887501	1	1B3EJ46 X0TN162315	0	1028
23	070103	TN162316	03	JDH41	TA887601	1	1B3EJ46 X2TN162316	0	1028
24	070103	TN162317	03	JDH41	TA887701	1	1B3EJ46 X4TN162317	0	1027
25	070103	TN162318	03	JDH41	TA887802	1	1B3EJ46 X6TN162318	0	1028
26	070103	TN162319	03	JDH41	TA887801	1	1B3EJ46 X8TN162319	0	1028
27	070103	TN162320	03	JDH41	TA887902	1	1B3EJ46 X4TN162320	0	1022
28	070103	TN162321	03	JDH41	TA887901	1	1B3EJ46 X6TN162321	0	1104
29	070103	TN237250	03	JDH41	TA887002	1	1B3EJ46 X5TN237250	0	0307
30	070103	TN237251	03	JDH41	TA887001	1	1B3EJ46 X5TN237251	0	0302
31	070103	TN237252	03	JDH41	TA887001	1	1B3EJ46 X4TN237252	0	0328
32	070103	TN237253	03	JDH41	TA887001	1	1B3EJ46 X6TN237253	0	0325
33	070103	TN237254	03	JDH41	TA887001	1	1B3EJ46 X4TN237254	0	0323
34	070103	TN237255	03	JDH41	TA887002	1	1B3EJ46 X5TN237255	0	0302
35	070103	TN237256	03	JDH41	TA887001	1	1B3EJ46 X4TN237256	0	0303
36	070103	TT208597	08	LPH42	TA320901	1	3P3ES47 C5TT208597	0	1020
37	070103	TT208598	08	LPH42	TA320902	1	3P3ES47 C7TT208598	0	1020
38	070103	TT208599	08	LPH42	TA320903	1	3P3ES47 C9TT208599	0	1021
39	070103	TT208600	08	LPH42	TA321001	1	3P3ES47 C1TT208600	0	1021
40	070103	TT208601	08	LPH42	TA321002	1	3P3ES47 C3TT208601	0	1021
41	070103	TT208602	08	LPH42	TA321003	1	3P3ES47 C5TT208602	0	1021
42	070103	TT208603	08	LPH42	TA321004	1	3P3ES47 C7TT208603	0	1021
43	070103	TT208604	08	LPH42	TA321101	1	3P3ES47 C9TT208604	0	1111
44	070103	TT208605	08	LPH42	TA321102	1	3P3ES47 C0TT208605	0	1021
45	070103	TT208606	08	LPH42	TA321103	1	3P3ES47 C2TT208606	0	1021
46	070103	TT208607	08	LPH42	TA321104	1	3P3ES47 C4TT208607	0	1021
47	070103	TT208608	08	LPH42	TA321105	1	3P3ES47 C6TT208608	0	1021
48	070103	TT208609	08	LPH42	TA321101	1	3P3ES47 C8TT208609	0	1021
49	070103	TT208610	08	LPH42	TA321102	1	3P3ES47 C4TT208610	0	1021
50	070103	TT208611	08	LPH42	TA321103	1	3P3ES47 C6TT208611	0	1021
51	070103	TT208612	08	LPH42	TA321104	1	3P3ES47 C8TT208612	0	1021
	070103	TT208613	08	LPH42	TA321105	1	3P3ES47 C0TT208613	0	1021

UNITED STATES POSTAL SERVICE

04/06/96

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COMPANY NO. 45 ACTIVE UNITS

THIRTY RENT-A-CAR SYSTEM,  
VEHICLE INVENTORY REPORT  
LICENSEE/UNIT NO. SEQ.

#09

CUST	UNIT	PGM	MODEL	VONNO	LSE	SERIAL	MILES	DELV DATE
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070103	TT203614	08	LPH42	TA321606	1	3P3ES47 C1TT203614	0	10279
070103	TT209296	08	LPH42	TA320801	1	3P3ES47 C7TT209296	0	10279
070103	TT209297	08	LPH42	TA320802	1	3P3ES47 C9TT209297	0	10279
070103	TT209298	08	LPH42	TA320803	1	3P3ES47 C0TT209298	0	10279
070103	TT210746	08	LPH42	TA321701	1	3P3ES47 C1TT210746	0	10289
070103	TT210747	08	LPH42	TA321702	1	3P3ES47 C8TT210747	0	10289
070103	TT210748	08	LPH42	TA321703	1	3P3ES47 CXTT210748	0	10289
070103	TT210749	08	LPH42	TA321801	1	3P3ES47 C1TT210749	0	10309
070103	TT210750	08	LPH42	TA321901	1	3P3ES47 C8TT210750	0	10309
070103	TT210751	08	LPH42	TA322001	1	3P3ES47 CXTT210751	0	10299
070103	TT210752	08	LPH42	TA322002	1	3P3ES47 C1TT210752	0	10309
070103	TT210753	08	LPH42	TA322003	1	3P3ES47 C3TT210753	0	10299
070103	TT210754	08	LPH42	TA322101	1	3P3ES47 C5TT210754	0	10309
070103	TT210755	08	LPH42	TA322102	1	3P3ES47 C7TT210755	0	11048
070103	TT210756	08	LPH42	TA322103	1	3P3ES47 C9TT210756	0	10299
070103	TT210757	08	LPH42	TA322201	1	3P3ES47 C0TT210757	0	10299
070103	TT210758	08	LPH42	TA322202	1	3P3ES47 C2TT210758	0	11055
070103	TT210759	08	LPH42	TA322203	1	3P3ES47 C4TT210759	0	10309
070103	TT210760	08	LPH42	TA322204	1	3P3ES47 C0TT210760	0	10309
070103	TT210761	08	LPH42	TA322205	1	3P3ES47 C2TT210761	0	10299
070103	TT210762	08	LPH42	TA322301	1	3P3ES47 C4TT210762	0	10309
070103	TT210763	08	LPH42	TA322302	1	3P3ES47 C6TT210763	0	10299
070103	TT210764	08	LPH42	TA322303	1	3P3ES47 C8TT210764	0	10299
070103	TT210765	08	LPH42	TA322401	1	3P3ES47 CXTT210765	0	10299
070103	TT210766	08	LPH42	TA322402	1	3P3ES47 C1TT210766	0	11066
070103	TT210767	08	LPH42	TA322403	1	3P3ES47 C3TT210767	0	10299
070103	TT210768	08	LPH42	TA322404	1	3P3ES47 C5TT210768	0	10299
070103	TT210769	08	LPH42	TA322405	1	3P3ES47 C7TT210769	0	11055
070103	TT210771	08	LPH42	TA322502	1	3P3ES47 C5TT210771	0	11055
070103	TT210772	08	LPH42	TA322503	1	3P3ES47 C7TT210772	0	10309
070103	TT210773	08	LPH42	TA322504	1	3P3ES47 C9TT210773	0	10309
070103	TT210774	08	LPH42	TA322505	1	3P3ES47 C0TT210774	0	10309
070103	TT210775	08	LPH42	TA322506	1	3P3ES47 C2TT210775	0	11055
070103	TT213881	08	LDH42	TA872501	1	3B3ES47 C3TT213881	0	10309
070103	TT213882	08	LDH42	TA872601	1	3B3ES47 C5TT213882	0	10309
070103	TT213883	08	LDH42	TA872602	1	3B3ES47 C7TT213883	0	10309
070103	TT213884	08	LDH42	TA872603	1	3B3ES47 C9TT213884	0	11022
070103	TT213885	08	LDH42	TA872701	1	3B3ES47 C0TT213885	0	11022
070103	TT213886	08	LDH42	TA872702	1	3B3ES47 C2TT213886	0	11022
070103	TT213887	08	LDH42	TA872801	1	3B3ES47 C4TT213887	0	11055
070103	TT213888	08	LDH42	TA872802	1	3B3ES47 C6TT213888	0	11055
070103	TT213889	08	LDH42	TA872901	1	3B3ES47 C8TT213889	0	11055
070103	TT213890	08	LDH42	TA872902	1	3B3ES47 C4TT213890	0	11055
070103	TT213891	08	LDH42	TA873001	1	3B3ES47 C6TT213891	0	11055
070103	TT213892	08	LDH42	TA873002	1	3B3ES47 C8TT213892	0	11055
070103	TT213893	08	LDH42	TA873101	1	3B3ES47 CXTT213893	0	11055
070103	TT213894	08	LDH42	TA873201	1	3B3ES47 C1TT213894	0	11055
070103	TT213895	08	LDH42	TA873202	1	3B3ES47 C3TT213895	0	11055

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THRIFTY RENT-A-CAR SYSTEM,

VEHICLE INVENTORY REPORT

LICENSEE/UNIT NO. SEQ.

#09

COLUMN 20-30 MUST CONTAIN UNIT

CUST	UNIT	PGM	MODEL	VONNO	LSE	SERIAL	MILES	DEL DATE
070103	TT213896	08	LDH42	TA875301	1	3B3ES47C5TT213896	0	1104
070103	TT213897	08	LDH42	TA875302	1	3B3ES47C7TT213897	0	1104
070103	TT213898	08	LDH42	TA875303	1	3B3ES47C9TT213898	0	1104
070103	TT213946	08	LPH42	TA875201	1	3P3ES47C7TT213946	0	1104
070103	TT213947	08	LPH42	TA875202	1	3P3ES47C9TT213947	0	1104
070103	TT213948	08	LPH42	TA875203	1	3P3ES47C0TT213948	0	1104
070103	TT213949	08	LPH42	TA875301	1	3P3ES47C2TT213949	0	1104
070103	TT213950	08	LPH42	TA875302	1	3P3ES47C4TT213950	0	1104
070103	TT213951	08	LPH42	TA875401	1	3P3ES47C0TT213951	0	1104
070103	TT213952	08	LPH42	TA875501	1	3P3ES47C2TT213952	0	1104
070103	TT213953	08	LPH42	TA875601	1	3P3ES47C4TT213953	0	1104
070103	TT213954	08	LPH42	TA875701	1	3P3ES47C6TT213954	0	1104
070103	TT213955	08	LPH42	TA875702	1	3P3ES47C8TT213955	0	1105
070103	TT213956	08	LPH42	TA875703	1	3P3ES47C0TT213956	0	1104
070103	TT213957	08	LPH42	TA875801	1	3P3ES47C1TT213957	0	1106
070103	TT213958	08	LPH42	TA875802	1	3P3ES47C3TT213958	0	1105
070103	TT213959	08	LPH42	TA875901	1	3P3ES47C5TT213959	0	1104
070103	TT213960	08	LPH42	TA875902	1	3P3ES47C1TT213960	0	1104
070103	TT213961	08	LPH42	TA876001	1	3P3ES47C3TT213961	0	1104
070103	TT213962	08	LPH42	TA876002	1	3P3ES47C5TT213962	0	1106
070103	TT220993	08	LDH42	TA874201	1	3B3ES47C5TT220993	0	1120
070103	TT221365	08	LPH42	TA876101	1	3P3ES47C5TT221365	0	1120
070103	TT221366	08	LPH42	TA876102	1	3P3ES47C7TT221366	0	1120
070103	TT221367	08	LPH42	TA876103	1	3P3ES47C9TT221367	0	1120
070103	TT221368	08	LPH42	TA876201	1	3P3ES47C0TT221368	0	1120
070103	TT221369	08	LPH42	TA876202	1	3P3ES47C2TT221369	0	1120
070103	TT221370	08	LPH42	TA876301	1	3P3ES47C9TT221370	0	1120
070103	TT221371	08	LPH42	TA876401	1	3P3ES47C0TT221371	0	1124
070103	TT221372	08	LPH42	TA876501	1	3P3ES47C2TT221372	0	1124
070103	TT221373	08	LPH42	TA876601	1	3P3ES47C4TT221373	0	1120
070103	TT221374	08	LPH42	TA876701	1	3P3ES47C6TT221374	0	1124
070103	TT221375	08	LPH42	TA876801	1	3P3ES47C8TT221375	0	1120
070103	TT221376	08	LPH42	TA876901	1	3P3ES47C0TT221376	0	1120
070103	TT221377	08	LPH42	TA876902	1	3P3ES47C1TT221377	0	1120
070103	TT221378	08	LPH42	TA876903	1	3P3ES47C3TT221378	0	1120
070103	TT221379	08	LPH42	TA876904	1	3P3ES47C5TT221379	0	1120
070103	TT224136	08	LDH42	TA874301	1	3B3ES47C5TT224136	0	1120
070103	TT224137	08	LDH42	TA874302	1	3B3ES47C7TT224137	0	1120
070103	TT224138	08	LDH42	TA874401	1	3B3ES47C9TT224138	0	1120
070103	TT224139	08	LDH42	TA874501	1	3B3ES47C0TT224139	0	1120
070103	TT224140	08	LDH42	TA874601	1	3B3ES47C2TT224140	0	1120
070103	TT224141	08	LDH42	TA874701	1	3B3ES47C4TT224141	0	1120
070103	TT224142	08	LDH42	TA874801	1	3B3ES47C6TT224142	0	1120
070103	TT224143	08	LDH42	TA874901	1	3B3ES47C8TT224143	0	1120
070103	TT224144	08	LDH42	TA875001	1	3B3ES47C0TT224144	0	1120
070103	TT224145	08	LDH42	TA875002	1	3B3ES47C2TT224145	0	1120
070103	TT224146	08	LDH42	TA875003	1	3B3ES47C4TT224146	0	1120
070103	TT224147	08	LDH42	TA875004	1	3B3ES47C6TT224147	0	1120

55

56

57

04/08/96

VCICP440

THRIFTY RENT-A-CAR SYSTEM,

VEHICLE INVENTORY REPORT

COMPANY NO. 45 ACTIVE UNITS

LICENSEE/UNIT NO. SEQ.

CUST	UNIT	PGM	MODEL	VONNO	LSE	SERIAL	MILES	DEL DAY
070103	TT224148	08	LDH42	TA875101	1	3B3ES47 CXTT224148	0	1124
070103	TT224149	08	LDH42	TA875102	1	3B3ES47 C1TT224149	0	1203
070103	TT224150	08	LDH42	TA875103	1	3B3ES47 C8TT224150	0	1203
070103	TT224332	08	LPH42	TA877001	1	3P3ES47 C5TT224332	0	1124
070103	TT224333	08	LPH42	TA877002	1	3P3ES47 C7TT224333	0	1125
070103	TT224334	08	LPH42	TA877003	1	3P3ES47 C9TT224334	0	1125
070103	TT224335	08	LPH42	TA877004	1	3P3ES47 C0TT224335	0	1125
070103	TT224336	08	LPH42	TA877101	1	3P3ES47 C2TT224336	0	1125
070103	TT224337	08	LPH42	TA877102	1	3P3ES47 C4TT224337	0	1125
070103	TT224338	08	LPH42	TA877103	1	3P3ES47 C6TT224338	0	1120
070103	TT224339	08	LPH42	TA877201	1	3P3ES47 C8TT224339	0	1125
070103	TT224340	08	LPH42	TA877202	1	3P3ES47 C4TT224340	0	1207
070103	TT224341	08	LPH42	TA877301	1	3P3ES47 C6TT224341	0	1123
070103	TT224342	08	LPH42	TA877401	1	3P3ES47 C8TT224342	0	1123

CUST TOTAL

398

ACME AUTOC LEASING AS WINDSOR

04/08/96

VCICP440

COMPANY NO. 45, ACTIVE UNITS

THIRTY RENT-A-CAR SYSTEM,

VEHICLE INVENTORY REPORT

LICENSEE/UNIT NO. SEQ.

#09

CUST	UNIT	PGM	MODEL	VONNO	LSE	SERIAL	MILES	DELV DATE
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REPORT TOTAL 392

VCICP440 END OF JOB 04/08/96

Certified 20% post consumer

PAGE 10  
VICS

[illegible]

**F I L E D**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**APR - 9 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RICHARD LEE MURRAY,

Plaintiff(s),

vs.

STATE FARM FIRE & CASUALTY CO.,  
et al,

Defendant(s).

Case No. 94-C-837-B

ENTERED ON DOCKET

DATE **APR 10 1996**

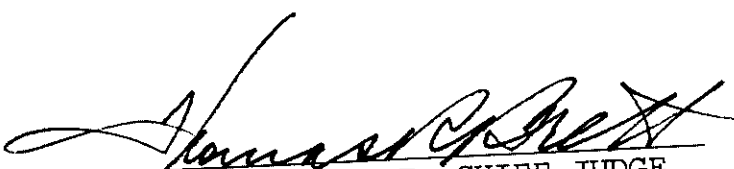
**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

**IT IS ORDERED** that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

**IT IS FURTHER ORDERED** that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

**IT IS SO ORDERED** this 9<sup>th</sup> day of April, 1996

  
THOMAS R. BRETT, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

**FILED**

**APR - 9 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

AMY EASTERDAY,

Plaintiff(s),

vs.

NISSAN MOTOR CO. CORP., USA,

Defendant(s).

Case No. 95-C-501-B

FILED ON DOCKET ✓

DATE **APR 10 1996**

**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

**IT IS ORDERED** that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

**IT IS FURTHER ORDERED** that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

**IT IS SO ORDERED** this 9<sup>th</sup> day of April, 1996

  
THOMAS R. BRETT, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FANNIE MAE GILES fka Fannie Mae  
Gibson; BOBBY JOE GILES; PACIFIC  
MUTUAL LIFE INSURANCE  
COMPANY; RESOLUTION TRUST  
CORPORATION As Receiver for Southwest  
Savings Association, assignee of the Federal Savings  
and Loan Insurance Corporation as Receiver for  
Briercroft Savings Association, assignee of Briercroft  
Service Corporation; SOUTHWEST  
FEDERAL SAVINGS ASSOCIATION a  
Resolution Trust Corporation Receivership, transferee  
of the Resolution Trust Corporation as Receiver for  
Southwest Savings Association, assignee of the  
Federal Savings and Loan Insurance Corporation as  
Receiver for Briercroft Savings Association, assignee  
of Briercroft Service Corporation;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma; UNKNOWN OCCUPANT OF  
3515 E. Woodrow Pl., Tulsa, Oklahoma,

Defendants.

) Civil Case No. 95-C 436B

**FILED**

APR - 9 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 10 1996

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 9<sup>th</sup> day of April,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, BOBBY JOE GILES, appears not having

previously filed a Disclaimer; the Defendant, RESOLUTION TRUST CORPORATION as Receiver for Southwest Savings Association, assignee of the Federal Savings and Loan Insurance Corporation as Receiver for Briercroft savings Association, assignee of Briercroft Service Corporation, appears not having previously filed a Disclaimer; the Defendant, SOUTHWEST FEDERAL SAVINGS ASSOCIATION a Resolution Trust Corporation Receivership, transferee of the Resolution Trust Corporation as Receiver for Southwest Savings Association, assignee of the Federal Savings and Loan Insurance Corporation as Receiver for Briercroft savings Association, assignee of Briercroft Service Corporation, has not been served and should be dismissed from this action; and the Defendants, FANNIE MAE GILES fka Fannie Mae Gibson, UNKNOWN OCCUPANT OF 3515 E. Woodrow, PL., Tulsa, Oklahoma, and PACIFIC MUTUAL LIFE INSURANCE COMPANY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, FANNIE MAE GILES fka Fannie Mae Gibson, was served with process a copy Summons and Complaint on June 21, 1995; that the Defendant, BOBBIE JOE GILES, was served with process a copy of Summons and Complaint on June 21, 1995; that the Defendant, PACIFIC MUTUAL LIFE INSURANCE COMPANY, acknowledged receipt of Summons and Complaint on June 22, 1995, by Certified Mail; that Defendant, RESOLUTION TRUST CORPORATION as Receiver for Southwest Savings Association, assignee of the Federal Savings and Loan Insurance Corporation as Receiver for Briercroft savings Association, assignee of Briercroft Service Corporation, acknowledged receipt of Summons and Complaint on June 22, 1995, by Certified Mail.

The Court further finds that the Defendant, UNKNOWN OCCUPANT OF 3515 E. Woodrow PL., Tulsa, Oklahoma, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning December 12, 1995, and

continuing through January 16, 1996, as **more** fully appears from the verified proof of publication duly filed herein; and that **this action** is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, UNKNOWN OCCUPANT OF Woodrow PL., Tulsa, Oklahoma, and **service** cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as **more fully** appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, UNKNOWN OCCUPANT OF 3515 E. Woodrow PL., Tulsa, Oklahoma. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon **this Court** to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 31, 1995; that the Defendant, BOBBY JOE GILES, filed his Disclaimer

on July 21, 1995; that the Defendant, **RESOLUTION TRUST CORPORATION** as Receiver for Southwest Savings Association, assignee of the **Federal Savings** and Loan Insurance Corporation as Receiver for Briercroft savings Association, assignee of **Briercroft Service Corporation**, filed its Disclaimer on July 14, 1995; and that the Defendants, **FANNIE MAE GILES** fka Fannie Mae Gibson, **PACIFIC MUTUAL LIFE INSURANCE COMPANY** and **UNKNOWN OCCUPANT OF 3515 E. Woodrow PL.**, Tulsa, Oklahoma, have **failed** to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds **that the** Defendant, **SOUTHWEST FEDERAL SAVINGS ASSOCIATION** a Resolution Trust Corporation Receivership, transferee of the Resolution Trust Corporation as Receiver for Southwest Savings Association, assignee of the Federal Savings and Loan Insurance Corporation as Receiver for **Briercroft** savings Association, assignee of Briercroft Service Corporation, is the one and the same as **Defendant**, **RESOLUTION TRUST CORPORATION**, and should therefore be dismissed as a **Defendant** herein.

The Court further finds **that the** Defendant, **FANNIE MAE GILES**, is one and the same person formerly known as **Fannie Mae** Gibson, and will hereinafter be referred to as "**FANNIE MAE GILES**." The Defendants, **FANNIE MAE GILES** and **BOBBY JOE GILES**, are husband and wife.

The Court further finds **that this** is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, **Oklahoma**, within the Northern Judicial District of Oklahoma:

**Lot Three (3), Block One (1), TOMMY'S ADDITION,  
an Addition in Tulsa County, State of Oklahoma,  
according to the recorded Plat thereof.**

The Court further finds that on April 20, 1983, the Defendant, FANNIE MAE GIBSON, executed and delivered to CHARLES F. CURRY COMPANY, her mortgage note in the amount of \$35,550.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, FANNIE MAE GIBSON, a single person, executed and delivered to CHARLES F. CURRY COMPANY, a mortgage dated April 20, 1983, covering the above-described property. Said mortgage was recorded on April 22, 1983, in Book 4685, Page 2766, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 24, 1991, CHARLES F. CURRY COMPANY, assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT. This Assignment of Mortgage was recorded on August 12, 1991, in Book 5341, Page 2107, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 15, 1991, the Defendant, FANNIE MAE GIBSON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on December 11, 1991 and June 2, 1992.

The Court further finds that the Defendant, FANNIE MAE GILES, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, FANNIE

MAE GILES, is indebted to the Plaintiff in the principal sum of \$48,556.04, plus interest at the rate of 12 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, FANNIE MAE GILES, UNKNOWN OCCUPANT OF 3515 E. Woodrow PL., Tulsa, Oklahoma and PACIFIC MUTUAL LIFE INSURANCE COMPANY, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, BOBBY JOE GILES and RESOLUTION TRUST CORPORATION as Receiver for Southwest Savings Association, assignee of the Federal Savings and Loan Insurance Corporation as Receiver for Briercroft savings Association, assignee of Briercroft Service Corporation, Disclaim any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, FANNIE MAE GILES, in the principal sum of \$48,556.04, plus interest at the rate of 12 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.46 percent per annum until paid, plus the costs of this action, plus any additional sums

advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, FANNIE MAE GILES, BOBBY JOE GILES, PACIFIC MUTUAL LIFE INSURANCE COMPANY, UNKNOWN OCCUPANT OF 3515 E. Woodrow, PL., Tulsa, Oklahoma, RESOLUTION TRUST CORPORATION as Receiver for Southwest Savings Association, assignee of the Federal Savings and Loan Insurance Corporation as Receiver for Briercroft savings Association, assignee of Briercroft Service Corporation, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, SOUTHWEST FEDERAL SAVINGS ASSOCIATION a Resolution Trust Corporation Receivership, transferee of the Resolution Trust Corporation as Receiver for Southwest Savings Association, assignee of the Federal Savings and Loan Insurance Corporation as Receiver for Briercroft savings Association, assignee of Briercroft Service Corporation, is hereby dismissed as a Defendant herein.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, FANNIE MAE GILES, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**S/ THOMAS R. BRETT**

---

**UNITED STATES DISTRICT JUDGE**

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 436B

LFR:flv

DATE 4-10-96

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**APR - 8 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,  
PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,  
DEFENDANTS.

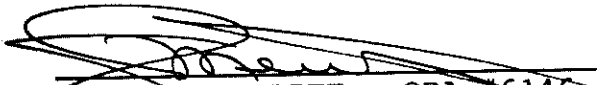
CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Tommy Rogers, only and the  
defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant  
to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all  
claims of such Plaintiff(s) against such Defendant(s) without  
prejudice.

The remaining Plaintiff(s) reserve all rights to proceed  
against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own  
costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 9 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

PROCEEDS OF BANK ACCOUNTS  
NO. 007890 AND 009958  
AT COMMUNITY BANK & TRUST,  
SENECA, MISSOURI,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

v.

TWENTY-FIVE (25) CALIFORNIA  
GOLD SLOT MACHINES, MORE OR  
LESS, WITH RELATED EQUIP-  
MENT, AND PROCEEDS,

and

THIRTY (30) ELECTRONIC  
BINGO MACHINES, MORE OR  
LESS, WITH RELATED  
EQUIPMENT, AND PROCEEDS,

Defendants.

CIVIL ACTION NO. 95-C-942-C

CONSOLIDATED WITH

CIVIL ACTION NO. 95-C-947-C

ENTERED ON DOCKET

DATE APR 10 1996

JUDGMENT OF FORFEITURE AND FOR RETURN OF CERTAIN  
PROCEEDS AND EQUIPMENT

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture against a portion of the defendant properties in the captioned civil actions, and all entities and/or persons interested in the defendant properties, the Court finds as follows:

Verified Complaints for Forfeiture In Rem was filed in Civil Action No. 95-C-942-C on the 18th day of September, 1995, and in Civil Action No. 95-C-947-C on the 19th day of September, 1995, alleging that the following-described defendant properties, to-wit:

**30 California Gold Slot Machines,  
M/L, with Related Equipment, and  
Proceeds,**

**26 Electronic Bingo Machines,  
M/L, with Related Equipment,  
and Proceeds,**

are subject to forfeiture pursuant to 18 U.S.C. § 1955 because the machines were used to conduct an illegal gambling business, as that term is defined in 18 U.S.C. § 1955, and 15 U.S.C. § 1171 because the machines were used in violation of the provisions of Chapter 15 U.S.C. §§ 1171 through 1178, and

**The sum of One Hundred Thousand  
Dollars (\$100,000.00) in Proceeds  
in Accounts No. 007890 and 009958  
on Deposit at Community Bank & Trust,  
Seneca, Missouri,**

**The Sum of \$3,560.00 In United States  
Currency Seized from the Premises of  
Border Town Bingo,**

because the bank accounts were used in furtherance of an illegal gambling business, as that term is defined in 18 U.S.C. § 1955.

Warrants of Arrest and Notices In Rem were issued by the Clerk of this Court on September 18, 1995 (in Civil Action No. 95-C-942-C), and on September 19, 1995 (in Civil Action No. 95-C-

947-C), providing that the United States Marshal for the Northern District of Oklahoma arrest, seize, and detain the above-described defendant properties in his possession until the further order of this Court. The Warrant further provided that the United States Marshals Service publish Notice of Arrest and Seizure in the Northern District of Oklahoma, according to law.

The United States Marshals Service personally served a copier of the Complaints for Forfeiture In Rem and the Warrants of arrest and Notices In Rem on the defendant properties as follows:

30 California Gold Slot Machines,  
M/L, with Related Equipment, and  
Proceeds.

Served:  
February 12, 1995

26 Electronic Bingo Machines,  
M/L, with Related Equipment,  
and Proceeds.

Served:  
February 12, 1995

The sum of One Hundred Thousand  
Dollars (\$100,000.00) in Proceeds  
in Accounts No. 007890 and 009958  
on Deposit at Community Bank & Trust,  
Seneca, Missouri.

Served:  
October 3, 1995

Proceeds in the Amount of  
\$3,560.00 Dollars, which  
were seized from the premises  
of Border Town Bingo,

Served:  
February 12, 1996

21" Video Monitor

Served:  
February 12, 1996

Two Computer Units

Served:  
February 12, 1996

The Eastern Shawnee Tribe of Oklahoma (the "Tribe"), the only known potential claimant with standing to file a claim against the defendant properties, entered into an agreement with the Plaintiff on the 16th day of February, 1996, whereby the following-described portion of the defendant properties shall be forfeited to the Plaintiff, to-wit:

**30 California Gold Slot Machines,  
M/L, with Related Equipment, and  
Proceeds;**

**26 Electronic Bingo Machines,  
M/L, with Related Equipment,  
and Proceeds;**

**The sum of \$67,387.24 of the \$100,000  
in Proceeds in Accounts No. 007890 and  
009958 on Deposit at Community Bank &  
Trust, Seneca, Missouri; and**

**Two gaming machines which  
were in storage and  
subject to grand jury  
proceedings,**

relinquishing all right, title, or interest they have, either jointly or severally, in and to the last-described defendant properties.

Pursuant to the agreement entered into by and between the Plaintiff and the Tribe, the following portion of the defendant properties shall be returned to the Tribe:

**The sum of \$32,612.76 in  
United States Currency of  
the \$100,000 arrested in**

Case No. 95-C-942-C, plus  
all accrued interest  
attributable to the  
entire \$100,000 since  
such arrest;

The sum of \$3,560.00 in  
United States Currency  
which was on the premises  
at the time of execution  
of the criminal seizure  
warrant, pursuant to  
which these civil actions  
arise;

21" Video Monitor; and

Two Computer Units,

USMS 285s reflecting the service upon the defendant  
properties are on file herein.

All persons or entities interested in the defendant  
properties were required to file their claims herein within ten  
(10) days after service upon them of the Warrants of Arrest and  
Notices In Rem, publication of the Notices of Arrest and Seizure,  
or actual notice of this action, whichever occurred first, and were  
required to file their answer(s) to the Complaints within twenty  
(20) days after filing their respective claim(s).

Other than the Tribe, there were no claims or answers  
filed by any individual or entity as to the defendant properties,  
and the Tribe's claims have since been withdrawn.

That since the Tribe is the only potential claimant to the defendant properties, notice of arrest and seizure was not published in the federal judicial district where these actions were filed and the defendant properties were seized.

Except as set forth above, no claims in respect to the defendant properties have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant properties, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the following-described defendant properties:

**30 California Gold Slot Machines,  
M/L, with Related Equipment, and  
Proceeds.**

**26 Electronic Bingo Machines,  
M/L, with Related Equipment,  
and Proceeds.**

**The sum of \$67,387.24 of the \$100,000  
Dollars in Proceeds in Accounts  
No. 007880 and 009958 on Deposit  
at Community Bank & Trust,  
Seneca, Missouri,**

**Two gaming machines which  
were in storage and  
subject to grand jury  
proceedings,**

and all persons and/or entities interested therein. The Tribe's interest, if any, in the last above-described defendant properties

was relinquished by virtue of the Agreement entered into by and between the Plaintiff and the Tribe on February 16, 1996 and the Tribe's withdrawal of claims filed March 22, 1996.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant properties:

30 California Gold Slot  
Machines, M/L, with  
Related Equipment, and  
Proceeds.

26 Electronic Bingo Machines,  
M/L, with Related Equipment,  
and Proceeds.

The sum of \$67,387.24 of the \$100,000  
Dollars in Proceeds in Accounts  
No. 007899 and 009958 on Deposit  
at Community Bank & Trust,  
Seneca, Missouri,

Two gaming machines which  
were in storage and  
subject to grand jury  
proceedings,

and that the above-described defendant properties be, and they hereby are, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the following-described defendant properties be returned to the Eastern Shawnee Tribe of Oklahoma, pursuant to Agreement


entered into by and between the Plaintiff and the Tribe on February 16, 1996:

The sum of \$32,612.76 in United States Currency of the \$100,000 arrested in Case No. 95-C-942-C, plus all accrued interest attributable to the entire \$100,000 since such arrest;

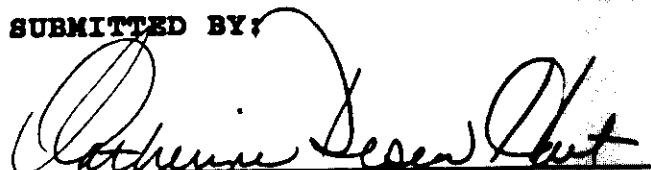
The sum of \$3,560.00 in United States Currency which was on the premises at the time of execution of the criminal seizure warrant, pursuant to which these civil actions arise;

21" Video Monitor; and

Two Computer Units,

  
H. DALE COOK, Senior Judge of the  
United States District Court

SUBMITTED BY:

  
CATHERINE DEPEW HART  
Assistant United States Attorney

NAUDD\CHOOK\PC\BORDER1\0626  
NAUDD\CHOOK\PC\BORDER2\0626

APR 10 1996

DATE \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DORIS M. SNOW,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

**F I L E D**

APR - 9 1996

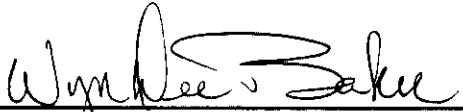
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CIVIL CASE NO. 95-C-573-BU

**STIPULATION OF DISMISSAL**

The plaintiff, Doris M. Snow, by her attorney of record, James R. Hicks, and the defendant, United States of America, acting on behalf of the Internal Revenue Service, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 28th day of MARCH, 1996.



**WYN DEE BAKER, OBA #465**  
Assistant United States Attorney  
333 W. 4th St., Suite 3460  
Tulsa, OK 74103-3809  
(918) 581-7463  
Attorney for Defendant



**JAMES R. HICKS**  
9th Floor, City Plaza West  
5310 East 31st Street  
Tulsa, OK 74135  
(918) 664-0800  
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 9 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

BENJAMIN BREWER,

Petitioner,

vs.

RON WARD, Warden of the  
Oklahoma State Penitentiary,

Respondent.

Case No. 92-C-487-BU

ENTERED ON DOCKET

DATE APR 10 1996

**ORDER**

This matter comes before the Court upon the Motion to Reconsider Judgment Pursuant to Federal Rule of Civil Procedure 60(b) filed by Petitioner, Benjamin Brewer. Respondent, Ron Ward, Warden of the Oklahoma State Penitentiary, has responded to the motion and Petitioner has replied thereto. Based upon the parties' submissions, the Court makes its determination.

In 1979, a Tulsa County jury convicted Petitioner of first degree murder and sentenced him to death. The Oklahoma Court of Criminal Appeals reversed the conviction based upon prosecutorial misconduct and remanded the case for a new trial. Brewer v. State, 650 P.2d 54 (Okla.Crim.App. 1982). Upon retrial in 1983, Petitioner was again convicted of first degree murder and sentenced to death. The Oklahoma Court of Criminal Appeals affirmed the conviction and sentence, Brewer v. State, 718 P.2d 354 (Okla.Crim.App. 1986), and the United States Supreme Court denied a writ of certiorari, Brewer v. Oklahoma, 479 U.S. 871, 107 S.Ct. 245, 93 L.Ed.2d 169 (1986). Petitioner thereafter filed an application for post-conviction relief with the District Court for

Tulsa County, State of Oklahoma. The district court denied the application on September 16, 1988. The district court's ruling was affirmed by the Oklahoma Court of Criminal Appeals in an unpublished opinion on September 8, 1989. See, Order Affirming Denial of Post Conviction Relief attached as Exhibit B to Petitioner's motion. Subsequently, Petitioner filed petitions for habeas corpus relief in the District Court of Oklahoma County, State of Oklahoma, and the Oklahoma Court of Criminal Appeals. These petitions were dismissed.

On June 12, 1992, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Oklahoma. On May 5, 1993, Petitioner filed an amended petition for writ of habeas corpus, raising thirty-six separate claims for relief. An evidentiary hearing was held by the Honorable Thomas R. Brett on December 15 and 23, 1993, with respect to five of Petitioner's claims. On February 10, 1994, Petitioner's amended petition for writ of habeas corpus was denied. See, Findings of Fact, Conclusions of Law and Order attached as Exhibit D to Petitioner's motion. Judge Brett issued a certificate of probable cause to appeal on March 4, 1994. An appeal was timely filed with the Circuit Court of Appeals for the Tenth Circuit. In his appeal, Petitioner only challenged Judge Brett's denial of two of his claims, specifically, ineffective assistance of counsel at the penalty phase of the trial and denial of due process based upon the trial court's failure to appoint a mental health expert to assist

in the penalty phase of trial. The Tenth Circuit affirmed Judge Brett's denial of Petitioner's amended habeas petition on April 5, 1995. Brewer v. Reynolds, 51 F.3d 1519 (10th Cir. 1995). Petitioner's petition for rehearing and rehearing en banc was denied on May 9, 1995. Petitioner's petition for writ of certiorari was denied by the United States Supreme Court on February 20, 1996. Brewer v. Ward, \_\_\_\_ U.S. \_\_\_\_, 116 S.Ct. 936, 133 L.Ed.2d 862 (1996). The Oklahoma Court of Criminal Appeals subsequently set an execution date for Petitioner of April 26, 1996.

On March 21, 1996, Petitioner filed the instant motion, requesting Judge Brett to vacate the Findings of Fact, Conclusions of Law and Order and Judgment entered on February 10, 1994 for violation of 28 U.S.C. § 455(a)<sup>1</sup>; to stay the April 26, 1996 execution and to transfer the case to a different judge for the purpose of instituting new proceedings on the issues raised in Petitioner's amended habeas corpus petition. On March 25, 1996, Judge Brett issued an Order recusing himself from the merits of this case as well as the instant motion. This matter was thereafter reassigned to this Court for resolution.

Petitioner, in his motion, contends that Judge Brett's order and judgment must be vacated because Judge Brett failed to recuse

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<sup>1</sup>Section 455(a) provides:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

himself from adjudicating the merits of Petitioner's amended habeas petition in light of the Tenth Circuit's decision in Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), which was issued fifteen (15) days prior to the entry of Judge Brett's order and judgment.<sup>2</sup> In Harris, the petitioners brought claims alleging that they had been denied due process as a result of delays in processing their direct criminal appeals. Shortly after a three-judge panel was designated to hear common issues of law and fact for the claims, the petitioners requested Judge Brett, one of the panel members, to disqualify himself under 28 U.S.C. § 455. Harris, 15 F.3d at 1570. The petitioners noted that the Honorable Tom Brett, Judge Brett's uncle, was a named defendant in the action. Id. In addition, they noted that because of their claims, Judge Brett would be required to review actions in which his uncle was involved as a judge on the Oklahoma Court of Criminal Appeals. The petitioners expressed concern that the familial relationship between a sitting judge and a named defendant presented an appearance of possible bias. Id. Upon review of the motion, Judge Brett agreed to recuse himself from the petitioners' damages claims; but not from the habeas claims. Id. On appeal, the Tenth Circuit found that Judge Brett erred in failing to recuse himself as to the habeas claims. Id. The Tenth Circuit determined that Judge Brett should have recused himself under § 455(a) as the petitioners' claims required the three-judge panel "to review not only the opinions of the Oklahoma

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<sup>2</sup>Although the Harris opinion was issued on January 26, 1996, the mandate was not issued until February 17, 1994, seven days after Judge Brett's decision.

Court of Criminal Appeals, but also decide whether that court participated in, or at least authorized, alleged violations of petitioners' constitutional rights." Id. at 1571. The Tenth Circuit further determined that recusal under § 455(b) was required as Judge Brett's uncle was a named party to the action. Id. Notwithstanding these determinations, the Tenth Circuit declined to vacate any of the orders of the three-judge panel as requested by the petitioners. Finding the recusal error harmless, the Tenth Circuit concluded that the proper remedy was for the Tenth Circuit to review the rulings of the three-judge district court panel on the merits. Id. at 1572.

In the instant case, Petitioner states that the opinion of the Oklahoma Court of Criminal Appeals affirming his conviction on direct appeal was authored by Judge Brett's uncle. Petitioner also states that Judge Brett's uncle was a member of the five-member panel of the Oklahoma Court of Criminal Appeals which affirmed the order of the Tulsa County District Court denying his application for post-conviction relief. Given these facts, Petitioner argues that the Harris decision mandated Judge Brett's disqualification under § 455(a) as to his amended habeas petition. Petitioner notes that Judge Brett faced with a similar situation in Anthony Banks v. Dan Reynolds, et al., Case Number 92-C-747-B, recused himself sua sponte under § 455(a) based upon the Harris decision, despite the parties' express waiver of recusal on the record. See, Reporter's Transcript of Proceedings had on April 6, 1994, attached as Exhibit C to Petitioner's motion. **Because** Judge Brett failed to disclose

sua sponte the potential conflict to the parties in the instant case and disqualify himself under § 455(a), Petitioner contends that vacation of Judge Brett's order and judgment is appropriate under Rule 60(b)(6), Fed. R. Civ. P.<sup>3</sup> Petitioner notes that the Supreme Court approved of such relief pursuant to Rule 60(b)(6) in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).

Respondent, in response, maintains that the Court should refuse to consider the merits of Petitioner's Rule 60(b)(6) motion as it constitutes an attempt to circumvent the well-established law regarding successive and abusive habeas petitions. Respondent asserts that Rule 9(b), Rules Governing Section 2254 Cases, 28 U.S.C., provides that a second or successive petition may be dismissed where new and different grounds are alleged and the court finds that the failure to assert those grounds in a prior petition is an abuse of the writ. According to Respondent, the issue of Judge Brett's recusal is a new and different ground, which could have been, and should have been, raised prior to the entry of the Judge Brett's order and judgment. Hence, Respondent argues that this Court should follow other courts which have treated motions similar to Petitioner's Rule 60(b)(6) motion as a second habeas petition and find the petition constitutes an abuse of the writ. In addition, Respondent argues that this Court should decline to address the merits of Petitioner's Rule 60(b)(6) motion because it

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<sup>3</sup>Rule 60(b)(6) provides that a court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment."

was not filed within a reasonable time as required by the provisions of Rule 60(b). Respondent asserts that almost two years have transpired since the issuance of the Harris decision and Judge Brett's order and judgment and Petitioner has failed to provide any explanation as to why he was unable to seek more timely relief.

In the alternative, Respondent argues that even if the Court were to consider the motion on the merits, the motion should be denied as Petitioner has not shown a legal basis for his contention that Judge Brett was required to recuse himself under § 455(a). Respondent asserts that the considerations which compelled recusal in Liljeberg are not present in this case. Likewise, Respondent contends that the Harris decision does not dictate recusal. Respondent specifically asserts that the Tenth Circuit's concern and the ultimate determination of the necessity of recusal in Harris was based upon the narrow issue of Judge Brett determining whether his uncle violated the petitioners' due process rights. Respondent notes that the narrow issue is not present in the instant case. Lastly, Respondent argues that Judge Brett's failure to recuse, if error, was harmless error. Respondent contends that Petitioner has not demonstrated substantive injustice as a result of Judge Brett's failure to recuse. Respondent notes that the denial of habeas relief by Judge Brett was affirmed by the Tenth Circuit and certiorari was denied by the United States Supreme Court. Any injustice, Respondent argues, would be on the State of Oklahoma as it would be required to re-litigate the issues which have previously been decided and affirmed on appeal. Therefore,

Respondent contends that Petitioner's Rule 60(b)(6) motion should be denied.

In reply, Petitioner argues that Judge Brett's Order of March 25, 1996, determining that **recusal** is appropriate "not only as to the merits of the case, but **also** as to the instant Rule 60(b) motion," has addressed the **merits** of the factual claims underlying his Rule 60(b)(6) motion and has resolved those claims in his favor. In light of Judge Brett's Order, Petitioner maintains that Respondent's arguments that Petitioner's motion should be treated as a second habeas petition, that Petitioner's motion is untimely and that recusal was not **required** in the original habeas proceedings are now moot. Petitioner argues that Judge Brett's determination only places in this Court the burden to craft a remedy for Judge Brett's failure to recuse under § 455(a) prior to the entry of his order and judgment. Petitioner urges that the proper remedy for that failure is to vacate the order and judgment. Petitioner maintains that the **equities** in favor of vacating Judge Brett's order and judgment **outweigh** those equities in favor of denying the requested relief.

Upon review, the Court **finds** it unnecessary to address whether Petitioner's Rule 60(b)(6) motion is a second habeas petition or is untimely under the provisions of Rule 60(b), or whether Judge Brett violated § 455(a) by failing to recuse himself from adjudicating the merits of Petitioner's **amended** habeas petition. Assuming *arguendo* that Petitioner has properly sought relief under Rule 60(b)(6), the requested relief is **timely** and Judge Brett violated

§ 455(a), the Court determines that vacation of the Findings of Fact, Conclusions of Law and Order and Judgment entered on February 10, 1994 is not warranted.

A violation of § 455(a) does not automatically require vacating a final judgment. Indeed, the Supreme Court has noted that "[t]here need not be a draconian remedy for every violation of 455(a)." Liljeberg, 486 U.S. at 862, 108 S.Ct. at 2203-2204. As with other areas of the law, the "harmless error" rule applies to a breach of a judge's duty to disqualify under 455(a). Id. In determining whether a judgment should be vacated for violation of § 455(a), the Supreme Court has established certain factors which must be considered. These factors include (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process. Id. at 864, 108 S.Ct. at 2205.

As to the first factor, the Court finds little or no risk of injustice to the parties in the instant case by declining to vacate Judge Brett's order and judgment. Of the thirty-six claims raised in the amended habeas petition and addressed by Judge Brett in his order, Petitioner only appealed the denial of two of the claims.<sup>4</sup>

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<sup>4</sup>In his motion, Petitioner notes that Judge Brett as to certain claims did not conduct an independent analysis of the claims but rather relied solely upon conclusions of the Oklahoma Court of Criminal Appeals to deny the claims. Petitioner states that the resolution of the claims in such manner strengthens the impression that there was doubt as to Judge Brett's impartiality when reviewing his uncle's opinion. This Court notes, however, that none of the claims in question were appealed to the Tenth Circuit.

The first claim, ineffective assistance of counsel during the penalty phase of his trial, was a mixed question of law and fact which was reviewed de novo by the Tenth Circuit. Brewer v. Reynolds, 51 F.3d at 1523. By conducting a de novo review, the Tenth Circuit was in the same position as Judge Brett in reviewing the merits of the claim. Thus, the Court cannot agree that Petitioner will suffer an injustice by allowing Judge Brett's order and judgment to stand. Other courts in similar circumstances have found that the risk of injustice to the parties is minimal at best. In re Continental Airlines Corp., 901 F.2d 1259, 1263 (5th Cir. 1990) (the risk of injustice to the parties in allowing to stand a summary judgment ruling subject to de novo review is usually slight); Parker v. Connors Steel Co., 855 F.2d 1510, 1526 (11th Cir. 1988), cert. denied, 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989) (the risk of injustice to the parties in a case of plenary review is non-existent).

The Court is mindful that Judge Brett's factual findings were subject to review for clear error only. Brewer v. Reynolds, 51 F.3d at 1523. However, the Court notes that the Tenth Circuit, in resolving Petitioner's ineffective assistance of counsel claim, did not specifically rely upon any of Judge Brett's factual findings. In analyzing whether Petitioner had established the prejudice component of the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Tenth Circuit examined the evidence offered by Petitioner at the evidentiary hearing held by Judge Brett and considered the

impact that evidence would have had on the jury had it been presented at the penalty phase of the trial. Upon examination of the evidence and consideration of the impact of the evidence upon his sentence, the Court found that Petitioner had failed to establish his claim.

With regard to Petitioner's second claim, denial of due process based upon the trial court's failure to appoint a mental health expert during the penalty phase of trial, the Court notes that the Tenth Circuit affirmed Judge Brett's denial of that claim based upon a different analysis. Moreover, the Court notes that the Tenth Circuit's decision was not based upon specific factual findings made by Judge Brett. Thus, the Court finds the risk of injustice to the parties in allowing to stand Judge Brett's order and judgment as to the second claim does not exist.

Next, as to the second factor, the Court finds that a failure to vacate Judge Brett's order and judgment will not produce injustice in other cases. As Petitioner has noted, Judge Brett recused himself from the Banks case after the issuance of the Harris decision. The Court is also cognizant that Judge Brett has disqualified himself from other non-capital habeas cases which have involved his uncle. Moreover, Judge Brett's uncle is now deceased and potential conflict in future cases has disappeared. Furthermore, the Court finds that denial of Petitioner's requested relief will not affect other cases because the harmless error standard will be applied upon a case-by-case basis.

In regard to the third and final factor, the Court finds that

the public confidence in the judicial system will not be undermined if Judge Brett's order and judgment is not vacated. Petitioner only appealed two of the claims presented to Judge Brett. The Tenth Circuit fully addressed and resolved those claims on appeal. Petitioner has not alleged any actual bias on the part of Judge Brett nor has he alleged any specific error in his rulings. This Court believes that the public's confidence would in fact be lost if the Court were to vacate Judge Brett's order and judgment for reasons not relevant to the merits of Petitioner's claims. See, Parker, 855 F.2d at 1527 (public would "lose faith in our system of justice because a case would be overturned without regard to the merit of the . . . claims").

In sum, the Court, assuming arguendo that a violation of 455(a) has occurred in the present case, finds that the violation is harmless error and does not warrant Petitioner relief from the final judgment. Accordingly, Petitioner's Motion to Reconsider Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (Docket Entry #62) is **DENIED**. Petitioner's request for stay of the pending April 26, 1996 execution date is also **DENIED**.

ENTERED this 9<sup>th</sup> day of April, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

Post-It® Fax Note	7671	Date	4.9.96	# of pages	12
To	Atty Gen	From	R. Miller, Deputy		
Co./Dept.	USDC, N.D., Okla.				
Phone #	918-581-7796				
Fax #	405-521-6246				

BENJAMIN BREWER,  
Petitioner,  
  
vs.  
RON WARD, Warden of the  
Oklahoma State Penitentiary,  
Respondent.

DISTRICT COURT FOR THE  
RICT OF OKLAHOMA

**FILED**

APR 9 1996

Paul Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHWEST DISTRICT OF OKLAHOMA

Case No. 92-C-487-BU

ENTERED ON DOCKET  
DATE \_\_\_\_\_

**ORDER**

This matter comes before the Court upon the Motion to Reconsider Judgment Pursuant to Federal Rule of Civil Procedure 60(b) filed by Petitioner, Benjamin Brewer. Respondent, Ron Ward, Warden of the Oklahoma State Penitentiary. motion and Petitioner's submissions, the Cou

In 1979, a Tulsa degree murder and Criminal Appeals re misconduct and remain 650 P.2d 54 (Okla. Petitioner was again to death. The Okla conviction and sentence. Brewer v. State, 718 P.2d 354 (Okla.Crim.App. 1986), and the United States Supreme Court denied a writ of certiorari, Brewer v. Oklahoma, 479 U.S. 871, 107 S.Ct. 245, 93 L.Ed.2d 168 thereafter filed an application for post-

Post-It® Fax Note	7671	Date	4.9.96	# of pages	12
To	Atty Gen	From	R. Miller, Deputy		
Co./Dept.	USDC, N.D., Okla.				
Phone #	918-581-7796				
Fax #	405-521-6246				

Post-It® Fax Note	7671	Date	4.9.96	# of pages	12
To	OK Indigent Defense	From	R. Miller, Deputy		
Co./Dept.	USDC, N.D., Okla.				
Phone #	918-581-7796				
Fax #	405-521-6246				

TRANSM

**CONFIRMED**

ROVE - SEE DETAILS (SEE V)

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Co./Dept.	USDC, N.D., Okla.				
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Fax #	405-528-0308				

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MB : SEND TO MAILBOX PG : POLLING A REMOTE MP : MULTI-POLLING RM : RECEIVE TO MEMORY

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by Disk to 10m  
Circuit.

C/TRB per ~~\_\_\_\_\_~~  
Judge Burrage.

Post-It Fax Note	7671	0304-9-96	Page 12
To: OK - Benjamin Brewer	From: Ron Ward, District Attorney		
Co./Dept.	CR. SDC, N.D. OK		
Phone #	318-581-7796		
Fax #	318-581-7756		

BENJAMIN BREWER,  
Petitioner,

vs.

RON WARD, Warden of the  
Oklahoma State Penitentiary,  
Respondent.

DISTRICT COURT FOR THE  
DISTRICT OF OKLAHOMA

**FILED**

APR 9 1996

Phil Lombardi, Clerk  
U.S. District Court  
Northern District of Oklahoma

Case No. 92-C-487-BU

ENTERED ON DOCKET  
DATE \_\_\_\_\_

### ORDER

This matter comes before the Court upon the Motion to Reconsider Judgment Pursuant to Federal Rule of Civil Procedure 60(b) filed by Petitioner, Benjamin Brewer. Respondent, Ron Ward, Warden of the Oklahoma State Penitentiary, has responded to the motion and Petitioner has replied thereto. Based upon the parties' submissions, the Court makes its determination.

In 1979, a Tulsa County jury convicted Petitioner of first degree murder and sentenced him to death. The Oklahoma Court of Criminal Appeals reversed the conviction based upon prosecutorial misconduct and remanded the case for a new trial. Brewer v. State, 650 P.2d 54 (Okla.Crim.App. 1982). Upon retrial in 1983, Petitioner was again convicted of first degree murder and sentenced to death. The Oklahoma Court of Criminal Appeals affirmed the conviction and sentence, Brewer v. State, 718 P.2d 354 (Okla.Crim.App. 1986), and the United States Supreme Court denied a writ of certiorari, Brewer v. Oklahoma, 479 U.S. 871, 107 S.Ct. 245, 93 L.Ed.2d 169 (1986). Petitioner thereafter filed an application for post-conviction relief with the District Court for

## TRANSMISSION REPORT

THIS DOCUMENT WAS CONFIRMED  
(REDUCED SAMPLE ABOVE - SEE DETAILS BELOW)

**\*\* COUNT \*\***

TOTAL PAGES SCANNED : 12  
TOTAL PAGES CONFIRMED : 12

\*\*\* SEND \*\*\*

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MB : SEND TO MAILBOX	PG : POLLING A REMOTE	MP : MULTI-POLLING	RM : RECEIVE TO MEMORY

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To	Cynthia Lee	Fax	405-528-0308	Page	12
Co/Dept		Phone	581-1794	Page	12
Phone		Fax	581-7756	Page	12

1 DISTRICT COURT FOR THE  
TRICT OF OKLAHOMA

**FILED**

APR 9 1996

Phil Leppard, Clerk  
U.S. District Court  
Western District of Oklahoma

BENJAMIN BREWER,  
Petitioner,  
vs.  
RON WARD, Warden of the  
Oklahoma State Penitentiary,  
Respondent.

Case No. 92-C-487 RU

ENTERED ON DOCKET  
DATE \_\_\_\_\_

### ORDER

This matter comes before the Court upon the Motion to Reconsider Judgment Pursuant to Federal Rule of Civil Procedure 60(b) filed by Petitioner, Benjamin Brewer. Respondent, Ron Ward, Warden of the Oklahoma State Penitentiary, has responded to the motion and Petitioner has replied thereto. Based upon the parties' submissions, the Court makes its determination.

In 1979, a Tulsa County jury convicted Petitioner of first degree murder and sentenced him to death. The Oklahoma Court of Criminal Appeals reversed the conviction based upon prosecutorial misconduct and remanded the case for a new trial. Brewer v. State, 650 P.2d 54 (Okla.Crim.App. 1982). Upon retrial in 1983, Petitioner was again convicted of first degree murder and sentenced to death. The Oklahoma Court of Criminal Appeals affirmed the conviction and sentence, Brewer v. State, 718 P.2d 354 (Okla.Crim.App. 1986), and the United States Supreme Court denied a writ of certiorari, Brewer v. Oklahoma, 479 U.S. 871, 107 S.Ct. 245, 93 L.Ed.2d 169 (1986). Petitioner thereafter filed an application for post conviction relief with the District Court for

## TRANSMISSION REPORT

THIS DOCUMENT WAS CONFIRMED  
(REDUCED SAMPLE ABOVE - SEE DETAILS BELOW)

**\*\* COUNT \*\***

TOTAL PAGES SCANNED : 12  
TOTAL PAGES CONFIRMED : 12

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PD : POLLED BY REMOTE SF : STORE & FORWARD RI : RELAY INITIATE RS : RELAY STATION  
MB : SEND TO MAILBOX PG : POLLING A REMOTE MP : MULTI-POLLING RM : RECEIVE TO MEMORY

ENTERED ON DOCKET

DATE 4-10-96

**F I L E D**

**APR - 8 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H

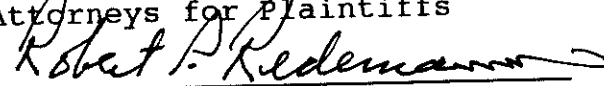
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Timothy Anderson, minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-10-96

**F I L E D**

**APR - 8 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

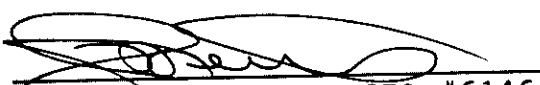
CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Jason Parrish, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET

DATE 4-10-96

**F I L E D**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

APR - 8 1996

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Barvell Patrick, Jr., only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-10-96

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Ricky Najera, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-10-96

**FILED**

APR - 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Joseph Najera and Patsy Najera, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET

DATE 4-10-96

**FILED**

APR - 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Jina Ryan, Christopher Ryan, Minor, Caleb Ryan, Minor, and Cody Ryan, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

FILED  
APR - 8 1996

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HENRY SMITH,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 95-C-70-B

ENTERED ON DOCKET  
DATE APR 6 9 1996


ORDER OF TRANSFER

Before the court are Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Respondent's response, and Petitioner's reply.

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Oklahoma County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

Accordingly, the petition for a writ of habeas corpus is hereby transferred to the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d). The Clerk shall mail a copy of the reply to Petitioner.

IT IS SO ORDERED this 8 day of Apr., 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRETT FOUT,

Petitioner,

vs.

RON WARD,

Respondent.

No. 96-C-0021-B

ENTERED ON DOCKET

DATE APR 09 1996

ORDER

This matter comes before the Court on Respondent's motion to dismiss for failure to exhaust state remedies. Petitioner has objected. He contends that the Tulsa County District Court denied his application for post-conviction relief on January 10, 1996.

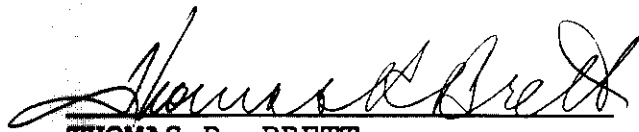
The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has not exhausted all of his state remedies. While he has presented

his claims to the Tulsa County District Court, he has yet to present them to the Court of Criminal Appeals of Oklahoma. 22 O.S. 1991, §§ 1080-1089. Petitioner must therefore give the Court of Criminal Appeals that opportunity. In the event Petitioner is not granted the relief which she seeks in an appeal from the denial of his application for post-conviction relief, he may refile his petition for a writ of habeas corpus in this Court.

Accordingly, Respondents' motion to dismiss (docket # 5) is granted and the petition for a writ of habeas corpus is hereby dismissed without prejudice.

SO ORDERED THIS 8 day of Apr, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**F I L E D**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**APR - 8 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**CIVIL ACTION NO. 94-C-417-B**

**PROCEEDS IN THE AMOUNT OF  
FIFTY-EIGHT THOUSAND THREE  
HUNDRED SEVENTY-THREE AND  
61/100 DOLLARS (\$58,373.61))  
FROM SALE OF REAL PROPERTY  
LOCATED AT:  
1203 EAST 19TH STREET,  
TULSA, OKLAHOMA,**

**Defendant.**

**ENTERED ON DOCKET**

**DATE APR 09 1996**

**JUDGMENT OF FORFEITURE**

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture as to the following-described defendant proceeds:

**PROCEEDS IN THE AMOUNT OF  
FIFTY-EIGHT THOUSAND THREE  
HUNDRED SEVENTY-THREE AND  
61/100 DOLLARS (\$58,373.61))  
FROM SALE OF REAL PROPERTY  
LOCATED AT:  
1203 EAST 19TH STREET,  
TULSA, OKLAHOMA,**

all persons and/or entities interested in the defendant proceeds,  
the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 25th day of April 1994, alleging that the defendant proceeds were subject to forfeiture pursuant to 18 U.S.C. §§ 981 and 1957 because they were involved in a transaction, or

attempted transaction(s), in violation of 18 U.S.C. §§ 1956 or 1957, or are proceeds traceable to such proceeds or because they constitute proceeds or are derived from proceeds traceable to a violation of 18 U.S.C. § 1344.

Warrant of Arrest and Notice In Rem was issued on the 29th day of April 1994, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant proceeds and for publication in the Northern District of Oklahoma.

On the 17th day of May 1994, the United States Marshals Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the defendant proceeds.

That Shearson Lehman Brothers, Inc., now Smith Barney, Shearson, Inc., hereafter referred to as 'Smith Barney,' Bank of Oklahoma, Carolyn Wood, Rose Mary Wood, and Penny B. Williams were determined to be the only potential claimants in this action with possible standing to file claims to the defendant proceeds.

USMS 285s reflecting the service upon the defendant proceeds and all known potential claimants, which are on file herein, are as follows:

**SHEARSON LEHMAN BROTHERS, INC.**  
now **SMITH BARNEY SHEARSON**  
by serving: Richard Stroud  
Vice President and Branch Manager  
200 Kennedy Building  
321 South Boston  
Tulsa, Oklahoma 74103

**Served:**  
**May 23, 1994**

**BANK OF OKLAHOMA**  
by serving: Lowell E. Faulkenberry  
Sr. Vice President and  
Director of Internal Auditing  
Bank of Oklahoma/One Williams Center  
Tulsa, Oklahoma 74103

**Served:**  
**May 18, 1994**

**CAROLYN WOOD**  
7130 South Lewis  
(Commercial Financial Services)  
Tulsa, Oklahoma 74136

**Served:**  
**June 3, 1994**

**ROSE MARY WOOD,**  
by serving Diana H. Clark,  
her Attorney  
(Doerner, Stuart, Saunders,  
Daniel, Anderson & Biolchini)  
320 South Boston Avenue  
Suite 500  
Tulsa, Oklahoma 74103-3725

**Served:**  
**May 27, 1994**

**PENNY B. WILLIAMS**  
by serving Clark Phipps,  
her attorney  
525 South Main, Suite 1500  
Tulsa, Oklahoma 74103

**Served:**  
**May 20, 1994**

All persons or entities interested in the defendant proceeds were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a Claim, Answer, or other response or defense herein, except Rose Mary Wood, whose Claim and Answer were filed June 6, 1994, and Shearson Lehman Brothers, Inc., whose Claim and Answer were filed June 21, 1994.

Smith Barney filed a Petition for Remission with the Department of Justice on June 21, 1994. The Department of Justice, Criminal Division of the Asset Forfeiture and Money Laundering Section granted the Petition for Remission of Smith Barney on January 24, 1996.

Plaintiff concurred with the petition ruling and acknowledged that the Claim of Smith Barney should be granted and that Smith Barney should be paid the net proceeds of the sale, after the expenses of forfeiture.

Rose Mary Wood filed a Petition for Remission with the Department of Justice. This Petition for Remission was denied by the Department of Justice, Criminal Division of the Asset Forfeiture and Money Laundering Section on January 26, 1996. Thereafter, Rose Mary Wood filed of record a withdrawal of her claim.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, a newspaper of general circulation in the Northern District of

Oklahoma, the district in which the defendant proceeds were seized, on June 23 and 30 and July 7, 1994. Proof of Publication was filed August 4, 1994.

No claims in respect to the defendant proceeds have been filed with the Clerk of the Court, except as set forth above, and no persons or entities have plead or otherwise defended in this suit as to said defendant proceeds, except Rose Mary Wood and Shearson Lehman Brothers, Inc., and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant proceeds, and all persons and/or entities interested therein, except Smith Barney whose Petition for Remission of the defendant proceeds has been granted by the Department of Justice, after deduction of all costs incurred by the United States Marshals Service in this action, including any preseizure title opinion or appraisal obtained by the Marshals Service prior to the sale of the real property. The claim of Shearson Lehman is hereby granted.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant proceeds:

PROCEEDS IN THE AMOUNT OF  
FIFTY-EIGHT THOUSAND THREE  
HUNDRED SEVENTY-THREE AND  
61/100 DOLLARS (\$58,373.61))  
FROM SALE OF REAL PROPERTY  
LOCATED AT:  
1203 EAST 19TH STREET,  
TULSA, OKLAHOMA,

be, and they hereby are, forfeited to the United States of America for disposition according to law and the grant of the petition for remission of Shearson Lehman Brothers, Inc., and accordingly, upon deduction of costs incurred by the United States Marshals Service, the United States Attorney's office, and the Federal Bureau of Investigation (FBI) in this forfeiture action, the United States Marshals Service shall release the defendant proceeds to Shearson Lehman Brothers, Inc., by mailing a check for the net amount remaining after all costs of the Marshals Service have been deducted to Shearson Lehman Brothers, inc., c/o James C. Hodges, Eller and Detrich, Attorneys at Law, 200 Midway Building, 2727 East 21st Street, Tulsa, Oklahoma 74114-3533.


Entered this 8<sup>th</sup> day of April, 1996.

S/ THOMAS R. BRETT

---

THOMAS R. BRETT  
United States District Judge

SUBMITTED BY:

  
CATHERINE DEPEW HART  
Assistant United States Attorney

N:\UDD\CHOOK\FC\WOOD1\04266

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
APR - 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA and )  
BRENDA JONES, Revenue Officer, )  
Internal Revenue Service, )

Plaintiffs, )

v. )

RONALD WEATHERS, )

Defendant. )

Civil No. 96-MC-008-B /

ENTERED ON DOCKET  
DATE APR 09 1996

**ORDER**

For good cause shown, IT IS HEREBY ORDERED that the show cause hearing scheduled for April 19, 1996, at 1:30 p.m. is hereby stricken. It is further ordered that because of the voluntary compliance of the defendant this action be dismissed, without prejudice.



THOMAS R. BRETT

United States District Judge

NOTE: THIS ORDER IS TO BE FILED  
BY THE CLERK OF COURT  
UPON RECEIPT OF THE  
ORIGINAL OF THIS ORDER

ENTERED ON DOCKET  
DATE 4-9-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

PAUL E. HOCKETT,  
Plaintiff,

Case No. 92-C-437 H

vs.

SUN COMPANY, INC., (R & M) and  
SUN COMPANY, INC., RETIREMENT  
PLAN,  
Defendant.

**ORDER AND JUDGMENT**

The Court has for consideration the Joint Motion to Approve Agreed Award of Attorney Fees filed by the Plaintiff and Defendants, and being fully advised as follows, finds that said Joint Motion should be, and hereby is, granted.

IT IS THEREFORE ORDERED AND JUDGMENT IS HEREBY ENTERED against Defendants and in favor of Plaintiff for the sum of One Hundred Ninety-Five Thousand and No/100 Dollars (\$195,000.00) as attorney fees for the Plaintiff through October 31, 1995, subject to the ruling of the United States Court of Appeals for the Tenth Circuit on Defendants' appeal of this Court's October 19, 1995, order in favor of Plaintiff and against Defendant. The judgment for attorney fees shall be added to the principal judgment and carry interest as provided by law from the date of the judgment.

IT IS FURTHER ORDERED that Plaintiff may file an additional motion for attorney fees incurred in connection with the appeal of this action to the United States Court of Appeals for the Tenth Circuit upon disposition of that appeal.

IT IS FURTHER ORDERED that the Clerk enter this order and judgment judgment docket.

DATED this 4<sup>th</sup> day of April, 1996.

S/ SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Frederic N. Schneider III  
Frederic N. Schneider III, OBA #8010  
BOONE, SMITH, DAVIS, HURST  
& DICKMAN  
100 West 5th Street, Suite 500  
Tulsa, Oklahoma 74103  
(918) 587-0000

ATTORNEYS FOR PLAINTIFF

Steven A. Broussard  
Steven A. Broussard, OBA #12582  
HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.  
320 South Boston Building, Suite 400  
Tulsa, Oklahoma 74103-3708.

ATTORNEYS FOR DEFENDANTS

DATE 4-9-96

**F I L E D**

APR - 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Action No. 96-C-0112H

COMES NOW the United States of America by Stephen C.

Dated this 8<sup>th</sup> day of April, 1996.

Stephen C. Lewis  
United States Attorney

LORETTA F. RADFORD, OBA #13625  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

This is to certify that on the 9th day of April, 1996, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

Nola Walters  
2413 N. Oswego, Ave.  
Tulsa, OK 74115

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHARLES W. FLINT, III, SUCCESSOR  
TRUSTEE OF KELLEY RANCH  
COMPANY, an Express Trust,

Plaintiff,

vs.

WESTERN FEED MILLS, INC.,

Defendant.

Case No. 95-C-959C

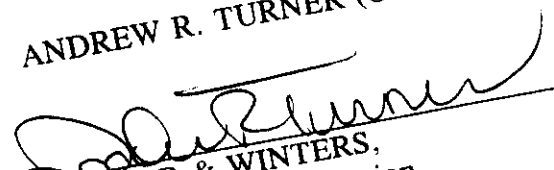
ENTERED ON DOCKET  
DATE APR 09 1996

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

The Plaintiff, Charles W. Flint, III, successor trustee of Kelley Ranch Company, an express trust, and the Defendant, Western Feed Mills, Inc., pursuant to Fed. R. Civ. P. rule 41(a)(1)(ii), hereby stipulate to the dismissal of this case with prejudice to its refiling, with each party to bear its own costs and attorneys' fees.

Respectfully submitted,

ANDREW R. TURNER (OBA No. 9175)

  
CONNER & WINTERS,  
A Professional Corporation  
2400 First Place Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4391  
(918) 586-5711

Attorneys for Plaintiff  
CHARLES W. FLINT, III, SUCCESSOR  
TRUSTEE OF KELLEY RANCH COMPANY  
AN EXPRESS TRUST

and

COY D. MORROW (OBA No. 6443)

A handwritten signature in cursive script, appearing to read "Coy D. Morrow", is written over a horizontal line.

WALLACE, OWENS, LANDERS, GEE,  
MORROW, WILSON, WATSON & JAMES  
21 South Main Street  
P.O. Box 1168  
Miami, Oklahoma 74355  
(918) 542-5501

Attorneys for Defendant  
WESTERN FEED MILLS, INC.

ENTERED ON DOCKET

DATE 4-9-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FEIZY IMPORT AND EXPORT  
COMPANY, a Texas corporation,

Plaintiff,

vs.

No. CIV-95-00188

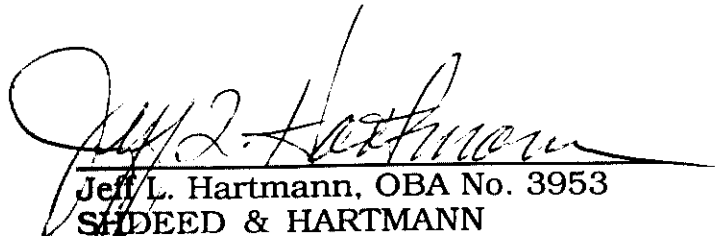
HAMID NAZARI and TERRI NAZARI,  
Husband and Wife, d/b/a GENIE  
UPHOLSTERY AND DECORATING;  
and ORIENTAL RUG WAREHOUSE,  
INC., a Kentucky Corporation,

Defendants.

**STIPULATION OF DISMISSAL**

Pursuant to provisions of FRCP, Rule 41(a)(1), the parties by and through their respective attorneys of record, stipulate to the dismissal with prejudice of the above-captioned case for the reason that the case has been settled.

Respectfully submitted,



Jeff L. Hartmann, OBA No. 3953  
SHDEED & HARTMANN  
4308 Classen Boulevard  
Oklahoma City, OK 73118  
Attorneys for Feizy Import and  
Export Company



Randall S. Strause, Esq.  
714 Lyndon Lane  
Suite 1, Lyndon Place  
Louisville, KY 40222  
Attorney for Oriental Rug  
Warehouse, Inc.

DATE 4-9-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 8 1996

WESTERN HERITAGE INSURANCE  
COMPANY,

Plaintiff,

*versus*

YUCATAN TULSA LIMITED  
PARTNERSHIP, an Oklahoma limited  
partnership, SHANE CRITTENDEN  
and JEREMY CRITTENDEN,

Defendants.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

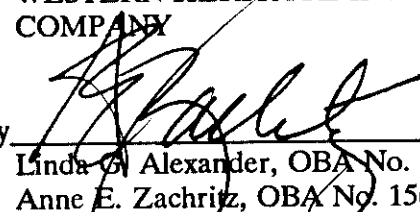
Case No. 96-C-52-K

**STIPULATION OF DISMISSAL**

COME NOW the Parties herein, by and through counsel, and hereby stipulate to  
dismissal of this action with prejudice to **refiling**, each party to bear its own costs, expenses and  
attorneys' fees.


WESTERN HERITAGE INSURANCE  
COMPANY

By

  
Linda G. Alexander, OBA No. 195  
Anne E. Zachritz, OBA No. 15608  
Three Hundred North Walker  
Oklahoma City, Oklahoma 73102  
Telephone: 405/232-2725

YUCATAN TULSA LIMITED  
PARTNERSHIP, SHANE  
CRITTENDEN, and JEREMY  
CRITTENDEN

By

  
William B. Hickman, OBA No. 4173  
1601 S. Main, #104  
Tulsa, Oklahoma 74119-4421  
Telephone: 918/582-9773

ENTERED ON DOCKET

DATE 4-9-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVEN G. FROST,

Plaintiff,

v.

THE EMPLOYERS FIRE INSURANCE  
COMPANY, a/k/a COMMERCIAL UNION  
INSURANCE COMPANIES, a Massachusetts  
corporation; and GEORGE E. AYERS  
INSURANCE AGENCY, INC., an Ohio  
corporation,

Defendants.

Case No. 95-C-506-H ✓

**FILED**

APR 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a **settlement** agreement, it is hereby ordered that the Clerk administratively terminate this action in his **records**, without prejudice to the rights of the parties to reopen the proceedings for good cause **shown** for the entry of any stipulation or order, or for any other purpose required to obtain a **final determination** of the litigation.

If, by May 6, 1996, the Parties **have not** reopened for the purpose of obtaining a final determination herein, this action shall be **deemed** dismissed with prejudice.

IT IS SO ORDERED.

This 5<sup>TH</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

DATE 4-9-96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 8 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

GALINO LOPEZ,

Plaintiff,

vs.

JOHNNY THOMPSON, et al.,

Defendants.

No. 95-C-907-H

**ORDER**

On March 11, 1996, the Court sua sponte granted Plaintiff an extension of time to respond to Defendants' motion to dismiss or, in the alternative, for summary judgment. Plaintiff has failed to do so.

Accordingly, this action is hereby DISMISSED for lack of prosecution.

IT IS SO ORDERED.

This 5<sup>TH</sup> day of APRIL, 1996.



Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE APR 08 1996

BETTY M. DEVILBISS,  
Plaintiff,  
vs.  
DAN DEVILBISS,  
Defendant.

No. 95-C-26-K

**FILED**

APR 05 1996

**ADMINISTRATIVE CLOSING ORDER**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 4 day of April, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

HAROLD D. HORNSBY,

Plaintiff,

v.

R. ROHLOFF, and T. THIERRY,

Defendants.

ENTERED ON DOCKET

DATE APR 0 8 1996

No. 95-C-0059-K

**FILED**

APR 0 5 1996

Phil Lombardi, Clerk  
U.S. District Court

**ORDER**

In this prisoner's civil rights action, plaintiff, pro se and in forma pauperis, alleges that defendants, who are officers with the Tulsa Police Department, conspired and acted to violate his civil rights in connection with his arrest and subsequent conviction. Defendants have moved to dismiss plaintiff's complaint, contending that they are immune from suit and that collateral estoppel prevents the relitigation of issues raised by plaintiff as to the reasonableness of defendants' stop of plaintiff's vehicle.

On January 9, 1992, Defendant Rohloff stopped<sup>1</sup> a 1984 Volvo, after receiving a radio communication from a police dispatcher that the Volvo had been reported stolen. Upon seeing plaintiff in the driver's seat of the Volvo, defendant Rohloff recognized plaintiff from a video tape of a robbery that had occurred earlier at a convenience store. Rohloff arrested plaintiff, who was subsequently tried and convicted of the armed robbery of the convenience store.

Plaintiff's complaint acknowledges that a dispatcher with the Tulsa Police Department told defendants that the 1984 Volvo had been reported stolen. Plaintiff, however, characterizes

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<sup>1</sup> Defendant Thierry acted as back-up to Defendant Rohloff's stop of plaintiff.

as “pretextual” defendant Rohloff’s belief that the Volvo was stolen, as plaintiff claims to own the Volvo. Plaintiff argues that defendants **fabricated** evidence to support their claimed belief that the Volvo was stolen, in order to justify an **otherwise** unlawful arrest and conviction of plaintiff. Plaintiff claims that defendants’ conspiracy **and** fabrication of evidence have violated his constitutional rights under the Fourth, Fifth **and** Fourteenth Amendments to the United States Constitution.

In their motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) (docket #7), defendants contend that they are entitled to **absolute** and/or qualified immunity for their testimony given at plaintiff’s trial and for the **affidavit** provided to obtain an arrest warrant against plaintiff. Defendants argue that plaintiff is **collaterally** estopped from contesting whether defendants acted reasonably in stopping the Volvo, and in subsequently arresting plaintiff. Plaintiff contends that defendants are not **entitled** to any immunity for their actions, and that collateral estoppel does not prevent an inquiry **here** into the reasonableness of defendants’ stop of plaintiff’s Volvo.

In determining whether to grant a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court focuses on the plaintiff’s complaint, **which** is construed in the light most favorable to plaintiff, and its allegations taken as true. **Since** plaintiff is proceeding pro se, the Court construes his complaint more liberally than it would **formal** pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). However, **the Court** should not assume the role of advocate, and should dismiss claims which are supported **only** by vague and conclusory allegations. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). A motion to dismiss will be denied unless it appears beyond all doubt that plaintiff can **prove** ~~no~~ <sup>set</sup> of facts in support of his claims to entitle

him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

1. Absolute and qualified immunity.

The defendants enjoy absolute immunity for the allegedly perjured testimony they offered at plaintiff's trial. Briscoe v. LaHue, 460 U.S. 325, 343 (1983). Defendants' motion to dismiss as to this issue will be granted.

Defendants' actions in obtaining the warrant to support plaintiff's arrest are not protected by absolute immunity, but may enjoy qualified immunity if those actions are deemed to be "objectively reasonable." Malley v. Briggs, 475 U.S. 335, 343-344 (1985).

In his complaint, plaintiff contends that defendant Rohloff prepared a "fabricated and forged" affidavit which was then submitted to an Oklahoma district court judge to obtain an arrest warrant against plaintiff. Plaintiff argues that defendant Rohloff's actions in preparing and submitting that affidavit cannot be deemed "objectively reasonable" because defendant Rohloff knowingly included a false statement in his affidavit. Rohloff's affidavit statement that he "noticed a stolen vehicle" when stopping the Volvo is false according to plaintiff because Rohloff knew that plaintiff was one of the registered owners of the Volvo.

The Court construes plaintiff's allegations of false statement by Rohloff in his affidavit as a claim of judicial deception, in which Rohloff sought to deceive the state district judge as to whether probable cause existed to arrest plaintiff. In claiming judicial deception in the face of a qualified immunity defense, "a plaintiff must make a substantial showing of deliberate falsehood or reckless disregard for truth, such that would be needed to challenge the presumed validity of an affidavit supporting a search warrant under Franks v. Delaware, 438 U.S. 154, 171 (1978)."

Snell v. Tunnell, 920 F.2d 673, 698 (10th Cir. 1990). A plaintiff claiming judicial deception must

also “establish that, but for the dishonesty, the challenged action would not have occurred.” Id. (citing Franks, 438 U.S. at 171-72 (“If when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.”))).

Plaintiff referred to Rohloff’s affidavit in his complaint, but did not attach a copy of that affidavit to the complaint. Defendants attached a copy of Rohloff’s affidavit to their reply to plaintiff’s response to defendants’ motion to dismiss. Generally, where a party has moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted and matters outside of the pleading have been presented to the court for consideration, the court must either exclude the material or treat the motion as one for summary judgment, giving the parties notice of the changed status of the motion and allowing the parties to present to the court all material made pertinent by Rule 56. Nichols v. United States, 796 F.2d 361, 364 (10th Cir. 1986). However, “when [the] plaintiff fails to introduce a pertinent document as part of his pleading, [the] defendant may introduce the exhibit as part of his motion attacking the pleading.” 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1327, at 762-63 (2d ed. 1990). Here, plaintiff based one of the claims in his lawsuit upon the content of Rohloff’s affidavit, and briefly quoted the affidavit in his complaint. Plaintiff has not objected to the authenticity of Rohloff’s affidavit submitted by defendants. Since plaintiff appears to have notice of the content of Rohloff’s affidavit and thus would not suffer surprise or prejudice from the Court’s consideration of that affidavit, the Court concludes that it will not exclude the affidavit and that such consideration of the affidavit does not require the Court to convert the motion to dismiss to one under Rule 56. Branch v. Turnell, 14 F.3d 449, 453-54 (9th Cir. 1994); Cortec

Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991).

Reviewing defendant Rohloff's affidavit,<sup>2</sup> the Court finds that plaintiff's allegations of falsity do not meet the standard set out in Franks and Snell. Rohloff's reference to the Volvo's being stolen is merely one sentence in a two-page, handwritten affidavit and appears to be offered as an explanation for stopping that vehicle. Defendant Rohloff's affidavit states factual details about the armed robbery of the convenience store and his recognition of plaintiff from the store video. The affidavit does not purport to charge plaintiff with possession of a stolen vehicle, but with armed robbery. The Court finds that Rohloff's reference to "a stolen vehicle" cannot be deemed a misstatement serious enough to invalidate the remainder of the affidavit and to constitute judicial deception. The Court therefore finds that defendant Rohloff's actions in swearing out the affidavit may be deemed "objectively reasonable" and that defendant Rohloff may be accorded qualified immunity in connection with the making of that affidavit. Defendants' motion to dismiss as to this issue will be granted.

## 2. Collateral Estoppel.

A federal court considering a section 1983 action must give preclusive effect to a state court judgment to the same extent a court in that state would. Allen v. McCurry, 449 U.S. 90, 96 (1980). Whether a prior state court judgment has preclusive effect is determined by that state's law; here, Oklahoma law governs. Hubbert v. City of Moore, Okl., 923 F.2d 769, 772-73 (10th

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<sup>2</sup> Plaintiff's complaint also averred that defendant Rohloff prepared a "fabricated and forged" affidavit by R. Hornsby which was eventually presented to the Oklahoma district court. A copy of the R. Hornsby affidavit was not provided by either party. Consideration of any claim of judicial deception as to that affidavit will not be made by the Court in this Order. Defendants, of course, may file a properly-supported dispositive motion to obtain the Court's consideration of the R. Hornsby affidavit.

Cir. 1991). The Oklahoma Supreme Court has held that a prior judgment of conviction has a preclusive effect in a civil action. Lee v. Knight, 771 P.2d 1003, 1006 (Okla. 1989). In Adamson v. Dayton Hudson Corp., 774 P.2d 478 (Okla. App. 1989), the Oklahoma Civil Court of Appeals considered the preclusive effect of a prior finding of probable cause. The plaintiff in Adamson brought a civil action for false arrest against the defendant merchant after being acquitted of charges of larceny from the merchant. The Adamson decision listed four requirements for finding such preclusion: 1) the issue sought to be precluded must be the same as that involved in the prior judicial proceeding, 2) the issue was litigated in the prior action, 3) the issue was in fact actually determined in the prior proceeding, and 4) the determination of that issue was necessary to support the judgment in the prior proceeding. Id. at 480.

Plaintiff claims the second of the four Adamson requirements for collateral estoppel has not been met, in that he has not had a "full and fair" opportunity to litigate the issue of whether defendants' stop of the Volvo was reasonable. In support of this claim, plaintiff contends that 1) defendant Rohloff was not present at plaintiff's preliminary hearing and thus plaintiff could not confront or cross-examine defendant, and 2) counsel was not appointed to represent plaintiff at his preliminary hearing.

Regarding plaintiff's complaint that defendant Rohloff was not present at plaintiff's preliminary hearing and thus denied plaintiff his right to confront defendant, the Court notes that an accused's right under the Sixth Amendment to confront and cross-examine witnesses at trial does not likewise extend to a preliminary hearing. Barber v. Page, 390 U.S. 719, 725 (1968); Mattox v. United States, 156 U.S. 237, 242 (1895). Plaintiff acknowledges in his complaint that defendant Rohloff was present and testified at plaintiff's trial, thereby affording plaintiff's counsel

an opportunity to confront and cross-examine Rohloff. The Court thus finds no merit to plaintiff's first claim of a denial to a "full and fair" opportunity to litigate the reasonableness of defendants' stop of the Volvo.


Plaintiff's assertion that counsel was not appointed to represent him at his preliminary hearing is more troubling. The accused has a Sixth Amendment right to the assistance of counsel at the preliminary hearing. Coleman v. Alabama, 399 U.S. 1, 9 (1970); Cleek v. State, 748 P.2d 39, 40-41 (Okl. 1987). As exhibits to their motion to dismiss, defendants have attached the docket sheets from the state court proceedings against plaintiff to show that plaintiff was represented by counsel at the preliminary hearing. However, as noted previously, on a motion to dismiss when presented with materials outside the pleadings, the Court must either exclude the materials or treat the motion as one for summary judgment under Rule 56, with the requisite notice to the parties and the opportunity to provide material made pertinent by Rule 56. At this time, the Court will exclude the exhibits offered by defendants and will deny, without prejudice, the motion to dismiss as to the issue of collateral estoppel. Defendants may reassert the motion to dismiss or file a motion for summary judgment on the collateral estoppel issue within thirty days after the date of this Order.

Conclusion

Defendants' motion to dismiss as to ~~the issues~~ of absolute and qualified immunity is **GRANTED**. The stay of discovery, pursuant to defendants' motion (docket #11), and granted by this Court on June 29, 1995 (docket #14) is hereby lifted.

Defendants' motion to dismiss as to ~~the issue~~ of collateral estoppel is **DENIED**, without prejudice.

IT IS SO ORDERED this 5 day of April, 1996.

  
TERRY C. KERN  
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MEMBER SERVICES LIFE INSURANCE COMPANY,  
doing business as MEMBER SERVICE  
ADMINISTRATORS, as third party administrator of  
the LIBERTY GLASS COMPANY ERISA QUALIFIED  
EMPLOYEE BENEFIT PLAN,

Plaintiff,

v.

AMERICAN NATIONAL BANK & TRUST COMPANY  
OF SAPULPA, as Guardian of William Brooks Balthis,  
Debra Leanne Balthis, and David D. Balthis; E. TERRILL  
CORLEY; THOMAS F. GANEM; STEVEN R. CLARK;  
BRADFORD J. WILLIAMS; and WALTER M. JONES,

Defendants.

**FILED**

APR 4 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-CV-27-H ✓

ENTERED ON DOCKET

DATE 4-5-96


**JUDGMENT**

This matter came before the Court on a Motion for Summary Judgment by Plaintiff Member Services Life Insurance Company and a Motion for Summary Judgment by Defendants American National Bank & Trust Company of Sapulpa, E. Terrill Corley, Thomas F. Ganem, Stephen R. Clark, and Bradford J. Williams. The Court duly considered the issues and rendered a decision in accordance with the order filed on April 2, 1996.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendants American National Bank & Trust Company of Sapulpa, E. Terrill Corley, Thomas F. Ganem, Stephen R. Clark, and Bradford J. Williams.

IT IS SO ORDERED.

This 4<sup>TH</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 4 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JAMES SCOTT HOOPER,

Plaintiff,

vs.

No. 94-C-343-H

TULSA COUNTY SHERIFF'S  
DEPARTMENT, et al.,

Defendants.

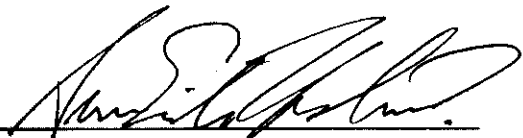
ENTERED ON DOCKET

DATE 4-5-96

**JUDGMENT**

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of all Defendants and against the Plaintiff, James Scott Hooper. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 4TH day of APRIL, 1996.

  
Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 4 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JAMES SCOTT HOOPER,  
Plaintiff,

vs.

No. 94-C-343-H ✓

TULSA COUNTY SHERIFF'S  
DEPARTMENT, et al.,  
Defendants.

FILED ON RECKET  
4-5-96

**ORDER**

This matter comes before the Court on Defendants' motions for summary judgment and Plaintiff's motion for partial summary judgment (docket #106, #111, #116, and #137). Also before the Court are Plaintiff's motions for leave to file third amended complaint and to strike the alternative title of his supplemental brief (docket #187 and #188). As more fully set out below, Defendants are entitled to judgment as a matter of law on Plaintiff's Eighth and Fourteenth Amendment claims.

**I. BACKGROUND AND PROCEDURAL HISTORY**

In April 1994, Plaintiff James Scott Hooper, a state prisoner proceeding pro se, brought this action pursuant to 42 U.S.C. § 1983 against Sheriff Stanley Glanz, Undersheriff Bill Thompson, Lieutenant Brian Edwards, Health Services Administrator Russell Lewis, and Tulsa County Commissioners Lewis Harris, John Selph, and Robert N. Dick. He alleged Defendants were deliberately indifferent to his medical needs during his incarceration in the "medical tank" at the Tulsa City County Jail (TCCJ) thereby

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exposing him to an inmate who had active tuberculosis (TB) in violation of his Eighth and Fourteenth Amendment rights. Hooper also alleged pendent state claims for "violation of state, local, municipal, and Tulsa County Jail health codes, laws, ordinances, and policies concerning isolation of persons with air-borne communicable diseases." He sought a declaratory judgment that Defendants violated his constitutional rights and compensatory damages.

On April 18, 1995, the Court denied Defendants' motions for summary judgment, holding that there remained genuine issues of material fact as to whether at least one inmate with active TB disease, as opposed to mere TB infection, was housed in the "medical tank" during the period of Hooper's incarceration. Only active TB is contagious. DeGidio v. Pung, 704 F.Supp. 922 F.Supp. 922, 924 (D. Minn. 1989).

## II. UNDISPUTED FACTS

The following facts are undisputed in the record.

1. It is the policy of the TCCJ to screen every inmate who comes into the jail at booking by completing a health screening form and visually checking for signs of active TB. If a member of the medical staff believes that an individual being booked into the jail has active TB, that person is not allowed to stay in the jail. (Lewis's February 15, 1996 response, docket #175, ex. B.)

2. Within ten days of booking into the TCCJ, every inmate receives a PPD skin test to detect the presence of TB unless the inmate refuses the test or is otherwise medically ineligible for it. If an inmate has a positive reaction to the PPD test, he is immediately referred to the Tulsa City County Health Department

(TCCHD) or a local hospital for immediate screening to determine whether or not he has active TB. If an individual is found by the health department or hospital to have active TB, he is held in isolation at the health department or hospital for ten days and given medications. The infected inmate is not permitted to return to the TCCJ until after the ten-day period when he is no longer contagious. (Id.)

3. Prior to his incarceration, Hooper was diagnosed for Hepatitis B and C and for "possible" HIV infection. In March 1993, Hooper tested negative for TB. (Second Amended Complaint, docket #74, exs. A and C.)

4. On January 9, 1994, Hooper was arrested and incarcerated in the TCCJ where he remained until he was transported to Lexington Assessment and Reception Center (LARC) on February 11, 1994. (Special Report, docket #14, at 9.)

5. During the course of his incarceration at the TCCJ, Plaintiff was detained in "tank B," the medical tank, on the 8th floor of the TCCJ. (Lewis's February 15, 1996 response, Docket #175, ex. A.)

6. From January 17 through February 11, 1994, Hooper took Lithium Carbonate and Elavil daily for his manic-depressive bipolar disorder. (Id., ex. D at 21 and 22.)

7. During Hooper's incarceration, from January 9 to February 11, 1994, six TCCJ inmates had positive TB skin tests. Of these inmates only one was housed at the same County Jail facility as Hooper. The other five individuals were housed at the Adult Detention Center ("ADC"), located approximately two miles from the County Jail facility. (Id., exs. B and C.)

8. On January 18, 1994, Inmate H, housed in cell B-4-8, the

cell next to Hooper's cell, requested to be moved to a different cell because his cell mate, inmate I, had told inmate H that he had pneumocistis carinii pneumonia and active TB. Jail officials transferred Inmate H to a different cell in tank B later that day. Inmate H had been booked into the TCCJ on December 6, 1993. Prior to his incarceration, he tested positive for HIV and had taken TB preventative medications. TCCJ officials ordered a chest x-ray which was read negative for active TB on December 28, 1993. (Id., ex. C.)

9. Jail officials sent Inmate I to the TCCHD on November 23, 1993, for a chest x-ray which also turned out to be negative. On January 7, 1994, inmate I returned to the TCCJ. His sputum sample was tested the same day with negative results for active TB. (Id.)

10. On February 27, 1994, Hooper tested positive for TB. A chest x-ray, however, did not indicate any signs of active infection for TB. (Second Amended Complaint, docket #74, exs. BB, CC, and DD.)

11. On March 4, 1994, through January 30, 1995, Plaintiff took Isoniazid (INH) as a prophylactic medical procedure to prevent the onset of active TB. (Plaintiff's supplemental response, doc. #162, ex. I.)

12. On March 10, 1994, Defendants booked in the TCCJ an individual who had been examined by the TCCHD for TB and was awaiting results from a sputum test. On March 25, 1994, the TCCHD informed TCCJ officials that the inmate had active TB. Jail officials immediately transported the inmate to the TCCHD for further evaluation and then to Doctor's Hospital for treatment. The inmate was permitted to return to the TCCJ only after it was determined that he was no longer contagious. (Lewis's February 15,

1996 response, docket #175, ex. A.)

13. On March 29, 1994, the TCCJ administered TB skin tests to 167 inmates and employees. The tests were read on March 31, 1994. Of those tested only one individual had an indurated area from the test greater than 5 millimeters. Nonetheless the TCCJ medical staff sent 24 individuals to the TCCHD for further evaluation. None of the 24 individuals, including the inmate with the indurated area greater than 5 millimeters, was found to have active TB. On June 28, 1994, the TCCJ medical staff administered a repeat skin test to those individuals tested in March 1994 and who remained in the TCCJ. The results were all negative. (Id.)

### III. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment

based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

#### IV. ANALYSIS

##### A. Claims Under the Eighth and Fourteenth Amendment

The Supreme Court has established two necessary elements for recovery of damages under a 42 U.S.C. § 1983 civil rights claim. A plaintiff must prove that he was deprived of a right secured by the United States Constitution and, that the deprivation was proximately caused by the defendant acting under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). The Court will address these issues in turn.

##### 1. Constitutional Violation

In order to establish a violation of the Eighth and Fourteenth Amendments, Hooper must show that Defendants acted with deliberate indifference in exposing him to active TB during his incarceration at the TCCJ. See Helling v. McKinney, 509 U.S. 25, \_\_\_, 113 S.Ct. 2475, 2481-82 (1993). Deliberate indifference exists when a prison

official knowingly disregards a substantial risk to the inmates' health and safety. Farmer v. Brennan, 114 S.Ct. 1970, 1972 (1994). The official must (1) be aware of the facts from which the inference can be drawn that substantial risk exists, and (2) he or she must also draw the inference. Id. According to the Farmer Court, deliberate indifference to inmate health or safety only occurs if the official subjectively knows of the risk to the inmate. If the official knows the inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it, then the official acted with deliberate indifference in violation of the Eighth Amendment. An obvious risk is equivalent to the official knowing of the risk. Id. at 1981. The requisite knowledge is a question of fact.

Despite drawing all inferences in Plaintiff's favor, Hooper cannot establish that Defendants knew he faced a substantial risk of exposure to TB between January 9 and February 11, 1994. The undisputed summary judgment evidence reveals that no TCCJ inmate was diagnosed with active TB during Hooper's incarceration. Even broadening the applicable time frame to include more than one month prior to Hooper's incarceration, the result remains the same. From December 1, 1993, through February 11, 1994, several inmates were tested for TB. In each instance, however, the TCCHD determined that those inmates did not have active TB.

Hooper's belief that his cell mate, inmate Wayne Wells, had active TB is insufficient to raise a genuine issue of fact. Hooper's assertion is wholly unsubstantiated. Plaintiff merely attests that Wells was "relentlessly coughing up very large amounts of phlegm day and night" and that he was extremely unsanitary. Cf. Kayser v. Caspari, 16 F.3d 280, 281 (8th Cir. 1994) (prisoner's

self-diagnosis does not establish that medical problems exist). In any event, Hooper cannot establish that Defendants subjectively knew he could face a substantial risk of exposure to TB as a result of being incarcerated with inmate Wells. Hooper relies on a January 31, 1994 "Prisoner Request and Grievance Form" to establish that Defendants were on notice of Wells's conditions. The grievance, however, mentioned neither Wells's coughing nor his possible infection with active TB, and focused instead on his body odor and use of profane language. (Jan. 9, 1996 supplement to Plaintiff's motion for summary judgment, docket # 162, ex. N.)

Hooper has raised issues of fact as to whether he refused the routine physical exam and PPD skin test on January 19, 1994, ten days after his incarceration in the TCCJ. He has also raised issues of fact as to whether he submitted written requests for a PPD skin test and a cell change on January 28, 1994, and whether Hooper's parents and sister repeated those requests over the telephone to jail officials. These issues of fact, however, are immaterial in view of Defendants' summary judgment evidence of lack of active TB during Plaintiff's incarceration at the TCCJ.

Therefore, the Court must conclude that the only inmate with active TB from December 1, 1993, through June 1, 1994, was booked in the TCCJ over thirty days after Defendants transported Plaintiff to LARC. As such Defendants were not aware that Plaintiff could face a substantial risk of exposure to TB during his incarceration at the TCCJ. Since Defendants were not aware of the facts from which an inference could be drawn that substantial risk existed, the Court finds they did not act with deliberate indifference in violation of Plaintiff's Eighth and Fourteenth Amendment rights.

Hooper argues that he could have been exposed to TB as a

result of the structural deficiencies in the physical plant and ventilation system, as well as Defendants' failure to test inmates for TB until the tenth day of incarceration. See Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (deliberate indifference may be shown by "systemic or gross deficiencies in staffing, facilities, equipment or procedures"), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981) (citation omitted). He contends that the antiquated physical plant and ventilation system make it possible for the TB bacilli to survive outside of the human body for extended periods of time. He further contends that failure to test all inmates upon booking into the jail permits individuals who have active TB, but are asymptomatic, to enter the jail without detection for at least ten days. Even if Plaintiff's theories were correct, unless evidence is developed that demonstrates an individual held at the TCCJ during Plaintiff's incarceration, or within a few weeks prior to his arrest, had active TB, there is nothing to casually link any alleged failure in the ventilation system and testing policy to Plaintiff's alleged exposure to TB.

Nor did Defendants' failure to isolate inmate D pending results of a sputum test present a sufficient "pattern" of deliberately exposing inmates to TB. While deliberate indifference may be shown by "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff," Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981) (citation omitted), the failure to isolate inmate D does not present such a systemic failure that would amount to deliberate indifference as in DeGidio v. Pung, 920 F.2d 525 (8th Cir. 1990), aff'g 704 F.Supp. 922 (D.Minn. 1989), and Inmates of Occoquan v. Barry, 717 F.Supp.

854 (D.D.C. 1989). The TB outbreak in Pung had been present for over ten years, prison officials continuously ignored the prisoners' claims, and no testing whatsoever was performed by the medical staff. Similarly, in Occoquan, the evidence pointed to systemic failures throughout the entire medical services that showed deliberate indifference to the medical needs of the inmates.

Because Hooper cannot prove any set of facts in support of his claim that Defendants deliberately exposed him to active TB during his incarceration, he cannot establish a violation of his Eighth and Fourteenth Amendment rights.

## 2. Proximate Cause

In addition to failing to establish a constitutional violation, Hooper cannot prove that there is a direct or proximate link between Defendants' actions or inactions and his positive PPD skin test on February 27, 1994. Plaintiff cannot establish that he did not contract inactive TB between March 6, 1993, and January 9, 1994. Nor can he establish that the result of the PPD skin test administered on March 6, 1993, was reliable, in spite of his infection with Hepatitis B and C which can have immunosuppressing effects.

## B. Pendent State Claims

Having dismissed Hooper's federal claims, the Court must decide whether to exercise pendent jurisdiction over his state law claims. See 28 U.S.C. § 1367(c)(3); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966). In making this determination, the Court "should take into account generally accepted principles of judicial economy, convenience, and fairness to the litigants." Olcott v. Delaware Flood Co, 76 F.3d 1538, 1550

(10th Cir. 1996). The Court "should also consider the particular circumstances of the case including the nature and extent of the pretrial proceedings." Id.

The factors in this case do not favor retention of jurisdiction. While this action has been pending for over two years, the parties have focused solely on the federal claims, conducting little or no discovery as to the state law claims. Therefore, judicial economy and convenience would not be served by retaining jurisdiction in this Court to avoid the expense and delay of another round of pretrial proceedings in state court.

#### V. CONCLUSION

Since no material facts remain in dispute as to any of Hooper's federal claims, Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' motions for summary judgment (docket #106-2 and #111) are GRANTED and Plaintiff's motion for partial summary judgment (docket #116-2) is DENIED. Plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE at this time and the motion for partial summary judgment of Defendant Lewis (docket #137) is DENIED as moot. Plaintiff's motions for leave to file third amended complaint (docket #187) is DENIED and his motion to strike alternative title (docket #188) is GRANTED.

SO ORDERED THIS 4TH day of APRIL, 1996.



Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 4 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DAVID W. RICHARD,  
Petitioner,  
vs.  
MICHAEL CODY, et al.,  
Respondent.

No. 96-C-42-B

ENTERED ON DOCKET

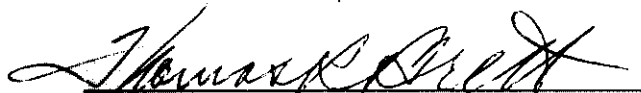
DATE APR 05 1996

**ORDER**

On March 7, 1996, the Court sua sponte granted Petitioner a fifteen-day extension of time to comply with this Court's order of January 29, 1996, which required Petitioner to submit his petition on the court authorized form. Petitioner has failed to do so.

Accordingly, this action is hereby DISMISSED for lack of prosecution.

SO ORDERED THIS 4<sup>th</sup> day of apr., 1996.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

WATERFRONT DEVELOPMENT, INC.,  
d/b/a HAMMERHEAD MARINA,

Plaintiff,

v.

RICHARD BUZZARD and MARK  
OVERTON,

Defendants.

Case No. 95-C-846-H ✓

APR 4 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 4-5-96

**ORDER**

This matter comes before the Court on an application for injunction by Plaintiff Waterfront Development, Inc., d/b/a Hammerhead Marina ("Waterfront Development") (Docket # 3) and a motion to dismiss and for realignment of parties by Defendant Richard Buzzard (Docket # 6).

Plaintiff commenced this action pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 181, et seq., claiming that it is entitled to exoneration from or, alternately, limitation of liability. Defendants Buzzard and Overton have asserted counterclaims against Waterfront Development sounding in negligence, strict products liability, and breach of implied warranty.

The Limitation of Liability Act only applies to owners of vessels. 46 U.S.C. § 183(a). The parties dispute whether Waterfront Development was the owner of the vessel in question at the time of Defendants' accident. Because the Court must make a preliminary determination as to ownership of the vessel, at a status conference on December 22, 1995, the Court ordered the parties to submit a joint stipulation of facts and memoranda of law discussing this issue.

**I.**

The Court accepts the facts set forth in the parties' joint stipulation as true. Therefore, the material facts are as follows:

1. Approximately one month prior to August 20, 1994, Defendant Buzzard and Plaintiff Waterfront Development came to an agreement for Defendant Buzzard to purchase the vessel or boat from Plaintiff.
2. On July 31, 1994, Plaintiff and Defendant Buzzard executed a Bill of Sale for the purchase of the subject vessel or boat.
3. On August 19, 1994, Plaintiff and Defendant Buzzard executed a Bill of Sale for the purchase of the subject vessel or boat.
4. Prior to any of the events enumerated herein, Plaintiff was, and presently remains, according to the records of the Oklahoma Tax Commission, record title owner of the boat in question.
5. On August 19, 1994, Defendant Buzzard delivered his personal check to Plaintiff in the amount of \$4,800.00, representing the purchase price of the boat.
6. On August 19, 1994, Plaintiff, by and through its authorized representative, executed the assignment portion of the Certificate of Title to the subject boat by duly notarized signature of the Plaintiff and original title to the boat was delivered to Defendant Buzzard. The name of the purchase was not filled in on the assignment portion of the Certificate of Title.
7. Possession of the subject boat was delivered to Defendant Buzzard no later than August 20, 1994.
8. The incident giving rise to the injuries complained of by the Defendants in their pleadings (Richard Buzzard and Mark Overton) occurred on August 20, 1994 after possession of the boat had been delivered to Defendant Buzzard and a check representing the purchase price and Certificate of Title had been exchanged by and between Defendant Buzzard and Plaintiff.
9. On or about August 29, 1994, payment was stopped on the check delivered by Defendant Buzzard to Plaintiff in the amount of \$4,800.00. By reason of the stop payment, Plaintiff has not received any of the sums constituting the agreed upon purchase price of the boat.

## II.

Under the Uniform Commercial Code, which governs sales of goods in Oklahoma, "a 'sale' consists in the passing of title from the seller to the buyer for a price." Okla. Stat. tit. 12A, § 2-106(1) (1963). "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . ." *Id.* § 2-401(2).

In the instant case, Defendant Buzzard received the boat from Plaintiff no later than August 20, 1994, but before the accident occurred. Defendant Buzzard had tendered payment to Plaintiff for the boat on the previous day. Further, Defendant Buzzard had received the original Certificate of Title from Plaintiff on August 19, 1994, with the assignment portion on the back of the title endorsed by Plaintiff. Applying the Uniform Commercial Code as codified in Oklahoma, the Court concludes that, pursuant to the delivery by Plaintiff of the boat and title, on the one hand, and, the delivery by Defendant Buzzard of his personal check for the full amount of the purchase price on the other hand, Defendant Buzzard was the owner of the boat when the explosion occurred on August 20, 1994. Therefore, Plaintiff has failed to state a claim under the Limitation of Liability Act. Defendant's motion to dismiss Plaintiff's claim is hereby granted.<sup>1</sup>

## III.

Defendant Buzzard attached to his brief in support of his motion to dismiss a copy of the petition filed in state court on October 14, 1994 by Plaintiff Waterfront Development, Case No. CJ-94-172 pending in the District Court in and for Craig County in the State of Oklahoma.

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<sup>1</sup> Pursuant to the provisions of the Limitation of Liability Act, Plaintiff has requested that this Court enjoin the state court proceedings pending the resolution of the instant litigation. Because the Court has determined that Plaintiff may not invoke the Limitation of Liability Act, Plaintiff's application for an injunction is hereby denied.

Plaintiff commenced the state court lawsuit to collect payment for the boat. Defendant Buzzard has asserted counterclaims in the state court action identical to those asserted here.<sup>2</sup>

Because a state court action regarding identical issues is pending, the Colorado River doctrine is implicated.<sup>3</sup> “The doctrine permits a federal court to dismiss or stay a federal action in deference to pending parallel state court proceedings, based on ‘considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.’” Fox v. Maulding, 16 F.3d 1079, 1080 (10th Cir. 1994). Before the doctrine may be applied, the Court must determine whether the federal and state proceedings are parallel. Id. at 1081. “Suits are parallel if substantially the same parties litigate substantially the same issues in different forums.” Id. The remaining issues in the instant lawsuit are pending in the state court lawsuit. Additionally, in the state court lawsuit, Plaintiff has asserted its claim for nonpayment. The Court is unaware whether Defendant Overton, whose claims would rest upon substantially the same facts as the claims of Defendant Buzzard, has joined in the state court lawsuit; however, presumably, he would not be foreclosed from intervening, if appropriate. The Court concludes that the proceedings are parallel.

The Supreme Court has set out a number of non-exclusive factors for courts to consider in determining whether to invoke this doctrine. “No single factor is dispositive . . . .” Id. at 1082. Some of these factors include whether either court has assumed jurisdiction over property; the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; the order in which the courts obtained jurisdiction; whether federal law provides the rule of decision, and the adequacy of the state court action to protect the federal plaintiff’s rights. Id. Here, the Court

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<sup>2</sup> The Court does not know whether Defendant Overton has joined in the state court lawsuit.

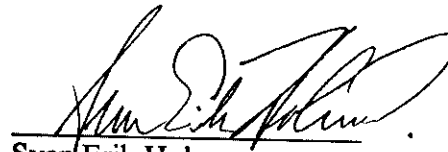
<sup>3</sup> This doctrine applies to “situations involving the contemporaneous exercise of concurrent jurisdictions . . . by state and federal courts.” Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976).

takes particular note of how it attained jurisdiction. Plaintiff invoked the jurisdiction of this Court under the Limitation of Liability Act. The Court has now concluded that Plaintiff may not assert the Act because it did not own the vessel in question. Thus, the remaining claims rest solely upon state law. Further, Plaintiff, who sought the jurisdiction of this Court, is an Oklahoma corporation and, therefore, will not be prejudiced by resolving the remainder of the lawsuit in Oklahoma state court. Additionally, the desirability of avoiding piecemeal litigation and conflicting resolutions militate in favor of dismissal. In conclusion, the Court believes that dismissal of the instant action is appropriate in light of the pendency of a prior state court action wherein the controlling issues of this litigation -- whether Plaintiff is liable for the accident under a theory of negligence, strict products liability, or breach of implied warranty -- will be resolved.

The Court grants Defendant's motion to dismiss Plaintiff's claim (Docket # 6). The Court denies Plaintiff's application for an injunction (Docket # 3). Further, the Court dismisses the remainder of the lawsuit, Defendants' counterclaims, because a prior state court action is pending wherein those issues will be resolved. In light of the Court's dismissal of the entire lawsuit, Defendant's motion to realign the parties (Docket # 6) is moot.

IT IS SO ORDERED.

This 4<sup>th</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 4 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

PENN-AMERICA INSURANCE COMPANY,  
a Pennsylvania corporation,

Plaintiff,

v.

R & S PROPERTIES OF TULSA, INC., and  
JEMW REALTY CORPORATION, d/b/a  
TWIN OAKS APARTMENTS,

Defendants.

Case No. 94-CV-615-H ✓

ENTERED ON DOCKET

DATE 4-5-96


**JUDGMENT**

This matter came before the Court on a Motion for Summary Judgment by Plaintiff and a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on April 2, 1996.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendant.

IT IS SO ORDERED.

This 4<sup>TH</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**APR 4 1996**

**Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

JANE I. SODERSTROM; JOHN F.  
SODERSTROM; PAMELA JO  
HANKINS; COUNTY TREASURER,  
Creek County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Creek  
County, Oklahoma, )

Defendants. )

ENTERED ON DOCKET

DATE 4-5-96

Civil Case No. 95-C 980H

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 3<sup>rd</sup> day of April,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Creek County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, appear by Michael S. Loeffler, Assistant District Attorney, Creek County, Oklahoma; and the Defendants, JANE I. SODERSTROM, JOHN F. SODERSTROM, and PAMELA JO HANKINS, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, JANE I. SODERSTROM and JOHN F. SODERSTROM, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, JANE I. SODERSTROM, waived service of Summons on October 11, 1995; that the Defendant, JOHN F. SODERSTROM, acknowledged receipt of Summons and Complaint via certified mail on December 5, 1995; that the Defendant, PAMELA JO HANKINS, was

served with process on February 17, 1996; that Defendant, COUNTY TREASURER, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on October 3, 1995; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on October 4, 1995.

It appears that the Defendants, COUNTY TREASURER, Creek County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, filed their Answer on November 2, 1995; and that the Defendants, JANE I. SODERSTROM, JOHN F. SODERSTROM, and PAMELA JO HANKINS, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

The South 5 feet of Lot Four (4) and all of Lot Five (5), and the North 10 feet of Lot Six (6), in Block Thirteen (13) BURNETT ADDITION to the City of Sapulpa, in Creek County, State of Oklahoma, according to the recorded Plat thereof. aka 414 N. Elizabeth.

The Court further finds that on May 12, 1988, Angela D. Sivadon, executed and delivered to Commercial Federal Mortgage Corporation her mortgage note in the amount of \$35,700.00, payable in monthly installments, with interest thereon at the rate of 8.625% per annum.

The Court further finds that as security for the payment of the above-described note, Angela D. Sivadon, a single person, executed and delivered to Commercial Federal Mortgage Corporation a mortgage dated May 12, 1988, covering the above-described

property. Said mortgage was recorded on May 19, 1988, in Book 235, Page 914, in the records of Creek County, Oklahoma.

The Court further finds that on February 11, 1993, Commercial Federal Mortgage Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., his/her successors and assigns. This Assignment of Mortgage was recorded on February 16, 1993, in Book 302, Page 1635, in the records of Creek County, Oklahoma.

The Court further finds that the Defendants, JANE I. SODERSTROM, JOHN F. SODERSTROM, and PAMELA JO HANKINS, are the current title owners of the property by virtue of a General Warranty Deed dated December 27, 1991, and recorded on December 27, 1991, in Book 285, Page 299, in the records of Creek County, Oklahoma. The Defendants JANE I. SODERSTROM, JOHN F. SODERSTROM, and PAMELA JO HANKINS, are the current assumptors of the subject indebtedness.

The Court further finds that on January 18, 1993, the Defendants, JANE I. SODERSTROM and PAMELA JO HANKINS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on August 26, 1993 and September 22, 1993.

The Court further finds that the Defendants, JANE I. SODERSTROM, JOHN F. SODERSTROM, and PAMELA JO HANKINS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JANE I. SODERSTROM,

JOHN F. SODERSTROM, and PAMELA JO HANKINS, are indebted to the Plaintiff in the principal sum of \$44,449.30, plus interest at the rate of 8.625 percent per annum from September 14, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Creek County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$34.97 which became a lien as of January 1, 1993; a lien in the amount of \$36.50 which became a lien as of January 1, 1994; and a lien in the amount of \$36.50 which became a lien as of January 1, 1995. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JANE I. SODERSTROM, JOHN F. SODERSTROM, and PAMELA JO HANKINS, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, JANE I. SODERSTROM, JOHN F. SODERSTROM, and PAMELA JO HANKINS, in the principal

sum of \$44,449.30, plus interest at the rate of 8.625 percent per annum from September 14, 1995 until judgment, plus interest thereafter at the current legal rate of 5.46 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Creek County, Oklahoma, have and recover judgment in the amount of \$107.97, plus costs and interest, for personal property taxes for the years 1992-1994, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, JANE I. SODERSTROM, JOHN F. SODERSTROM, PAMELA JO HANKINS, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, JANE I. SODERSTROM, JOHN F. SODERSTROM, and PAMELA JO HANKINS, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, COUNTY TREASURER, Creek County, Oklahoma, in the amount of \$107.97, personal property taxes which are currently due and owing.

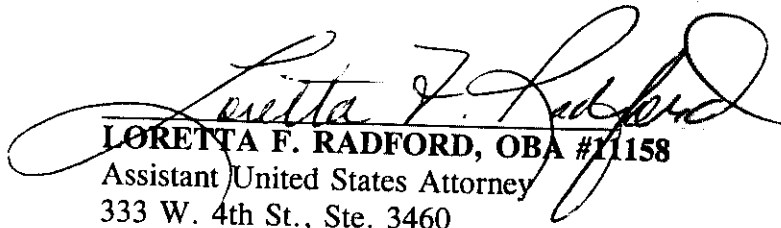
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**S/ SVEN ERIK HOLMES**  
UNITED STATES DISTRICT JUDGE

APPROVED:  
STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463



**MICHAEL S. LOEFFLER, OBA #12753**  
Assistant District Attorney  
110 West 7th-P.O. Box 567  
Bristow, OK 74010  
(918) 367-3331  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Creek County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95-C 980H

LFR/lg

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

UNITED STATES OF AMERICA,

APR - 3 1996

Plaintiff,

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

vs.

SHERRI L. CLARK; RICHARD C.  
CLARK; COUNTY TREASURER, Rogers  
County, Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Rogers County,  
Oklahoma,

ENTERED ON DOCKET  
DATE APR 04 1996

Defendants.

Civil Case No. 95 C 1041B

**AMENDED JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 3<sup>rd</sup> day of April,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; the Defendant, RICHARD C. CLARK, appears by his Attorney, Tom Bruner; and the Defendant, SHERRI L. CLARK, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, SHERRI L. CLARK, was served with process a copy of Summons and Complaint on December 7, 1995; that the Defendant, RICHARD C. CLARK, was served with process a copy of Summons and Complaint on December 7, 1995; that the Defendant, COUNTY TREASURER, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on October 20, 1995; and that Defendant, BOARD OF COUNTY COMMISSIONERS,

**NOTE: THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.**

Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on October 20, 1995.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on October 24, 1995; that the Defendant, RICHARD C. CLARK, filed his Disclaimer on January 12, 1996; and that the Defendant, SHERRI L. CLARK, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, SHERRI L. CLARK and RICHARD C. CLARK, were granted a Divorce in Case No. D-88-257, on December 20, 1988, in Rogers County, Oklahoma. The Defendants, SHERRI L. CLARK and RICHARD C. CLARK, are both single unmarried persons.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

The S $\frac{1}{2}$  of N $\frac{1}{2}$  of W $\frac{1}{2}$  of SW $\frac{1}{4}$  of NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 29, Township 21 North, Range 16 East of the I.B.&M., Rogers County, Oklahoma, together with a road easement as contained in Deed recorded in Book 585 Page 800.

The Court further finds that on April 21, 1987, the Defendants, SHERRI L. CLARK and RICHARD C. CLARK, executed and delivered to FIRST FEDERAL SAVINGS BANK OF OKLAHOMA, their mortgage note in the amount of \$48,682.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RICHARD C. CLARK and SHERRI L. CLARK, husband and wife, executed and delivered to FIRST FEDERAL SAVINGS BANK OF OKLAHOMA, a mortgage dated April 21, 1987, covering the above-described property. Said mortgage was recorded on April 22, 1987, in Book 757, Page 595, in the records of Rogers County, Oklahoma.

The Court further finds that on July 13, 1989, First Federal Savings Bank of Oklahoma, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 14, 1989, in Book 811, Page 362, in the records of Rogers County, Oklahoma.

The Court further finds that on June 1, 1989, the Defendant, SHERRI L. CLARK, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on June 1, 1990 and May 1, 1992.

The Court further finds that the Defendants, SHERRI L. CLARK and RICHARD C. CLARK, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, SHERRI L. CLARK and RICHARD C. CLARK, are indebted to the Plaintiff in the principal sum of \$79,512.51, plus interest at the rate of 10 percent per annum from March 24, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, SHERRI L. CLARK, is in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, RICHARD C. CLARK, disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, SHERRI L. CLARK and RICHARD C. CLARK, in the principal sum of \$79,512.51, plus interest at the rate of 10 percent per annum from March 24, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, SHERRI L. CLARK, RICHARD C. CLARK, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, SHERRI L. CLARK and RICHARD C. CLARK, to satisfy the money judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

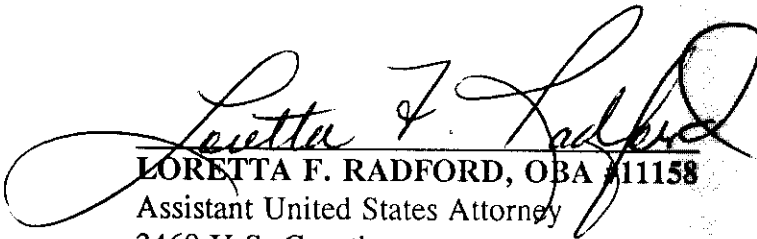
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

**S/ THOMAS R. BRETT**

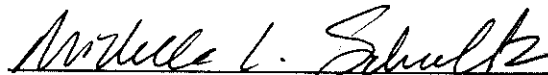
**UNITED STATES DISTRICT JUDGE**

APPROVED:

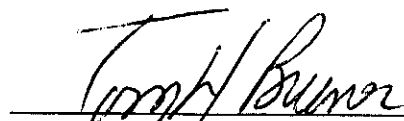
STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**MICHELE L. SCHULTZ, OBA 13771**  
Assistant District Attorney  
219 S. Missouri, Room 1-111  
Claremore, Oklahoma 74017  
(918) 341-3164  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Rogers County, Oklahoma



**TOM BRUNER, Esq.**  
406 S. Boulder  
Tulsa, OK 74103  
Attorney for Defendant,  
Richard C. Clark

Judgment of Foreclosure  
Civil Action No. 95 C 1041B

LFR:flv

FILED

APR - 3 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TANYA MORGAN,

Plaintiff,

vs.

Case No. 95-C-608-B

HILTI, INC., a corporation in  
the state of New York

Defendant.

ENTERED ON DOCKET

DATE APR 6 4 1996

ORDER

Before the Court for consideration is Defendant, Hilti, Inc.'s ("Hilti"), Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 (Docket # 10), in the claims of Plaintiff, Tanya Morgan ("Morgan"), for alleged violations of the Americans with Disabilities Act, 42, U.S.C. §§ 12101 et seq., the Family and Medical Leave Act, 29 U.S.C. §§ 2616 et seq., for tortious breach of employment contract, and for violation of state and federal public policy. Following a thorough review of the record and the applicable legal authority, the Court concludes the Defendant's motion should be GRANTED.

I. Undisputed Facts<sup>1</sup>

Morgan was employed by Hilti from July 2, 1984 until January 18, 1995. At the time of her termination Morgan was employed as a Fax/Mail Clerk. Morgan was hospitalized for severe depression and anorexia in November, 1992 and resumed her duties at Hilti in mid-

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<sup>1</sup>Plaintiff Morgan has wholly failed to follow the strictures of Local Rule 56.1.

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February, 1993.

During the remainder of 1993 Morgan was late for work, left early, or absent on at least 30 occasions, none of which lasted more than two (2) consecutive days. The reasons for Morgan's attendance and tardiness problems included minor illnesses, doctor appointments, dentist appointments, dependent illnesses, and being out the previous night. Morgan was informed in writing, via her annual performance report, that Hilti desired an improvement in her attendance and that her tardiness was unacceptable.

Hilti attendance records of Morgan showed at least 27 occasions during 1994 where Morgan was tardy, left early, or absent. This number is exclusive of the seven (7) weeks of paid short term leave granted Morgan for surgery. Hilti warned Morgan of the potential consequences of her continued pattern of tardiness and absenteeism on four (4) occasions in 1994. One such warning was delivered to Morgan on May 16, 1994, the day she returned from approved short term leave for surgery. This leave was not counted against Morgan's attendance. Morgan filed a charge of discrimination against Hilti with the Equal Employment Office Commission ("EEOC") on August 3, 1994.

Between January 3, 1995 and January 16, 1995, Morgan took one (1) day of scheduled vacation, was tardy once, left four (4) hours early for a doctor appointment, and was out one (1) day with a sick child. Morgan was notified of Hilti's decision to terminate her employment on January 18, 1995.

Between February 11, 1993 and January 12, 1995, Morgan

provided Hilti with six (6) separate releases from various health care providers which were either void of restrictions or stated Morgan could return to work with no restrictions. In her deposition Morgan testified that at all times during 1994, exclusive of the time she was on short term leave, through January 13, 1995 she was capable of performing her job. Morgan further states that she was physically able to work from the time of her termination until she regained employment on September 1, 1995. Additionally, Morgan testified in her deposition she has not been hospitalized nor under a doctor's care since she was terminated by Hilti.

## **II. The Standard of Fed.R.Civ.P. 56** **Motion for Summary Judgment**

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical

doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .

\*.\*

"A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

### III. Legal Analysis

#### A. Violations of the Americans with Disabilities Act Claims

##### 1. Discrimination Claim

Morgan claims Hilti discriminated against her in violation of the ADA. In addressing the issue of burdens and orders of proof in

ADA cases, Courts have sought guidance from Title VII case law. Henry v. Guest Services, Inc., 902 F.Supp. 245, 250 (D.D.C. 1995) (citing Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 157 (3d Cir. 1995)). A three-step burden-shifting analysis has been developed by the Supreme Court for application in Title VII cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (citing Sorensen v. City of Aurora, 984 F.2d 349, 351 (10th Cir. 1993)). In order to support a claim of discrimination,

[a] plaintiff first must establish a *prima facie* case of discrimination, typically consisting of proof that he or she was: (1) a member of a protected class, (2) qualified for the position, and (3) discharged in circumstances giving rise to an inference of discrimination. If the plaintiff carries that burden, the defense must articulate a legitimate, independent, nondiscriminatory reason for its action, and this operates to rebut a presumption of discrimination established by plaintiff's *prima facie* case. Then the plaintiff must show by a preponderance of the evidence that the defendant's proffered reasons are only a pretext for discrimination.

Fitzgerald v. Allegheny Corp., 904 F.Supp. 223, 230 (S.D.N.Y. 1995).

For purposes of this analysis, the Court believes Morgan has raised an issue of fact as to whether she was "disabled", as defined under the ADA, and whether she was a "qualified individual" under the ADA. Further, the Court believes a fact issue may exist as to whether Morgan was discharged in circumstances giving rise to an

inference of discrimination.<sup>2</sup> Assuming Morgan has established a *prima facie* case, the burden shifts to Hilti to articulate a legitimate, independent, nondiscriminatory reason for terminating Morgan. In proclaiming it terminated Morgan for poor attendance, Hilti has met this burden. Thus, Morgan must show by a preponderance of the evidence that Hilti's reason of poor attendance is only a pretext for discrimination.

In St. Mary's Honor Ctr. v. Hicks, --- U.S. ---, ---, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993), the Court held "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." (emphasis in original). In the summary judgment context, the Plaintiff is required to

[e]stablish a genuine issue of material fact either through direct, statistical, or circumstantial evidence as to whether the employer's reason for discharging her is false and as to whether it is more likely that a discriminatory reason motivated the employer to make the adverse employment decision.

Gallo v. Prudential Residential Services, 22 F.3d 1219, 1225 (2d Cir. 1994).

Morgan has not met this burden. The vast majority of the record which might support Morgan on this issue are merely conclusory statements posed by Plaintiff's counsel. In opposing

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<sup>2</sup>The circumstances include a letter Morgan's co-worker allegedly saw which included Plaintiff's name and highlighted entries of Plaintiff's attendance records, alleged disparate treatment with respect to other co-workers whose attendance was less than perfect, and Morgan being written up for a violation of Hilti's conflict of interest policy while an involved co-worker only received a verbal warning. The Court notes Plaintiff has failed to indicate the date this last event occurred.

summary judgment, Morgan may not merely rely on conclusory statements. Goenaga v. March of Dimes Defects Foundation, 51 F.3d 14, 19 (2d Cir. 1995) (citing L&L Started Pullets, Inc. v. Gourdine, 762 F.2d 1, 3-4 (2d Cir. (1985); Wyler v. United States, 725 F.2d 156, 160 (2d Cir. 1983); Curl v. IBM Corp., 517 F.2d 212, 214 (5th Cir. 1975), cert. denied, 425 U.S. 943, 96 S.Ct. 1683, 48 L.Ed.2d 187 (1976)). This Court is of the opinion that Morgan has failed to meet the burden of raising a genuine issue of material fact that Hilti's discharge of her was a pretext for discrimination. Summary judgment is hereby GRANTED on Morgan's claim of discrimination in violation of the ADA.

## 2. Retaliation Claim

Plaintiff Morgan asserts she was dismissed by Hilti in retaliation for her filing of EEOC complaint No. 311-94-1240. The Court is of the view that Morgan contemplates using the ADA as the basis of this alleged violation.<sup>3</sup> In addressing the issue of burdens and orders of proof in ADA cases, Courts have sought guidance from Title VII case law. Henry v. Guest Services, Inc., *supra*. In determining whether an employer has retaliated against its employee in violation of Title VII, a court must assess the

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<sup>3</sup>In Plaintiff's Amended Response to Defendant's Motion for Summary Judgment, Plaintiff seems to allege the retaliation was a violation of the Americans with Disabilities Act and the Family and Medical Leave Act. (Pl.'s Amended Response to Df.'s Motion for Summary Judgment, p. 2.) However, Plaintiff has failed to provide any further comment, argument, or authority which would support a claim of violation of the FMLA. Thus, this Court must proceed under the assumption that Morgan's claim is one arising under the ADA.

proof of discriminatory treatment claims using a three-stage procedure. McDonnell Douglas Corp. v. Green, *supra*. In order to support a claim of retaliation,

[a] plaintiff must first establish a *prima facie* case of retaliation. If a *prima facie* case of retaliation is established, then the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action. If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff.

Sauers v. Salt Lake, *supra*, at 1128.

In order to establish a *prima facie* case of retaliation, a plaintiff must prove three elements: "(1)... participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action." *Id.* (citing Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993)).

Morgan's filing of the 1994 EEOC complaint satisfies the first element of a *prima facie* case of retaliation. Hilti's termination of Morgan satisfies the second element. However, the record totally fails to reveal Morgan's theory as to how the filing of the EEOC complaint is causally connected with Morgan's termination in a retaliatory context. A mere allegation by the Plaintiff, if one exists, will not suffice to establish such a causal connection. Furthermore, the Court fails to find any evidence in the record which would support such a position.

Assuming, *arguendo*, Morgan had established a *prima facie* case of retaliation, Hilti has produced a legitimate, nondiscriminatory

reason for terminating Morgan. Hilti compiled the attendance records of Morgan for at least 17 months prior to the filing of her 1994 EEOC complaint, and continued to do so up to the date of her termination, some five (5) months hence. Over the span of these 22 months, Morgan had approximately 60 occurrences of being tardy and/or absent, exclusive of her approved short term leave which totaled approximately seven (7) weeks. Hilti warned Morgan repeatedly of the consequences if she continued her pattern of tardiness and absenteeism. Such warnings were given as late as December, 1994. On at least three (3) occasions through the first 10 working days of 1995, Morgan was tardy or absent.<sup>4</sup> Hilti terminated Morgan on January 18, 1995 citing Morgan's lack of concern to improve her attendance.

Notwithstanding the sheer conjecture provided in Plaintiff's Response Brief, Morgan has completely failed to show any reason that Hilti's decision to terminate was a mere pretext for discrimination. Morgan claims that Hilti's reason for her firing was pretextual in that her absenteeism and tardiness were not in violation of Hilti's policies and procedures. However, the Court is unable to verify this allegation as Hilti's policies seem to allow some flexibility with respect to personal time off and do not have any definitive guidelines as to the amount of personal time an employee is allowed before triggering the invocation of disciplinary procedures. However, it seems unreasonable to force

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<sup>4</sup>Morgan also took a day of scheduled vacation on January 3, 1995.

Hilti to allow any employee to escape discipline who had roughly 60 occurrences of absenteeism or tardiness over a two (2) year period in which the employee was off approximately four (4) additional months for short term leave. The Court is of the view that Morgan has failed to raise a genuine issue as to any material fact regarding Hilti's articulated reason being pretextual and that Hilti is thus entitled to judgment as a matter of law with respect to Morgan's claim of retaliation. Summary judgment is hereby GRANTED with respect to Morgan's claim of retaliation.

**C. Violation of Family & Medical Leave Act**

The Family and Medical Leave Act ("FMLA") and the regulations thereunder prohibit an employer from discriminating against an employee who has exercised their rights under FMLA or to otherwise interfere with the attempted exercise of FMLA rights. 29 U.S.C. § 2615(a); 29 CFR 825.220(c). In arriving at the proper result in this case, the Court is able to forego any analysis of whether Morgan was an eligible employee under the FMLA or whether Morgan had a serious health condition for the simple reason that Hilti did not violate any provision of the FMLA.

Morgan asserts that Hilti violated the FMLA by giving her a threatening letter immediately following her return from approved short term leave. Morgan alleges this was discriminatory since no other employee received such a letter upon their return from approved short term leave. However, Morgan fails to show that other Hilti employees were similarly abusive of routine attendance

to the same extent, thus, Morgan cannot credibly claim she was treated differently than similarly situated employees.

Hilti did present Morgan with a letter, dated May 16, 1994, which informed Morgan of the number of sick days utilized to date, the amount of short term disability taken, and how long it would be until Morgan accrued any additional sick days. The letter also informed Morgan that Hilti did not usually allow employees to use vacation time as sick days. Furthermore, the letter discussed the need for proper attendance and the potential consequences of further absenteeism exceeding the allotted sick days. (Defendant's Brief in Support of Defendant's Motion for Summary Judgment, Ex. C).

The record reflects that Hilti was prepared to discipline and warn Morgan about her continued absenteeism and tardiness prior to her leave, but postponed the action until she returned. (Defendant's Brief in Support of Defendant's Motion for Summary Judgment, Ex. A, n. 9). Even though an arguably threatening letter was presented to Morgan on the day of her return from short term leave, the FMLA is void of any provision which dictates the timing in which an employer may warn an employee of a work-related problem, whether it be attendance or otherwise.

The Court is of the view that Morgan has failed to raise a genuine issue as to any material fact and that Hilti is entitled to judgment as a matter of law with respect to Morgan's violation of the FMLA claim. Summary judgment is hereby GRANTED with respect to Morgan's claim of violation of the FMLA by Hilti.

#### **D. Tortious Breach of Employment Contract Claim**

##### **1. Discrimination Claim**

Morgan seeks a common law cause of action against Hilti for violation of Oklahoma public policy arising from her claim of discrimination. Morgan avers Hilti discriminated against her based on an alleged disability. It is claimed by Morgan that this alleged discrimination resulted in her termination. Under this scenario, Morgan's termination would be classified as status-based, disabled, for purposes of analysis. See List v. Anchor Paint, \_\_\_ P.2d \_\_\_, 67 OBJ-No. 2, 127 (Okla. Jan. 9, 1996). In List, *supra*, the Oklahoma Supreme Court addressed status-based terminations and common law causes of action and concluded the tort of wrongful discharge is limited to the remedies and procedures of existing anti-discrimination statutes, if the employee has an "adequate" remedy which includes the right to a jury trial. As Morgan has referred to this claim in terms of a wrongful discharge, the Court is of the opinion that List should apply to this status-based discrimination claim.<sup>5</sup> The provisions of the ADA provide Morgan an adequate remedy. See 42 U.S.C. §§ 12101 et seq. Thus, Morgan's common law claim is precluded.

##### **2. Retaliation Claim**

Morgan seeks a common law cause of action against Hilti, violation of Oklahoma public policy, based on Hilti terminating her in retaliation for her filing of an EEOC complaint. As it is

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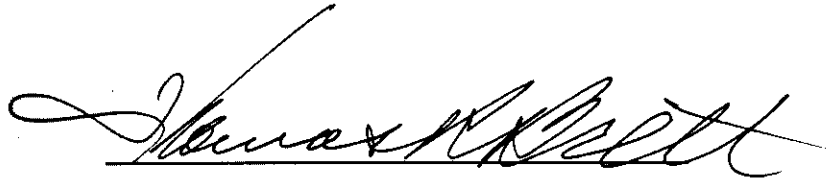
<sup>5</sup>See Plaintiff's Amended Response to Defendant's Motion for Summary Judgment, p. 11.

unclear whether List, *supra*, applies to retaliatory discharges, the Court shall follow the holdings of Burk v. K-Mart, 770 P.2d 24 (Okla. 1989), and such applicable cases so related.

Where an employment contract is of indefinite duration, it is terminable at will by either party. Hayes v. Eateries, Inc., 905 P.2d 778, 781 (Okla. 1995) (citing Singh v. Cities Service Oil Company, 554 P.2d 1367, 1369 (Okla. 1976)). The Oklahoma Supreme Court recognizes that an at-will employer may discharge an employee for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. Burk, at 26. The Oklahoma Supreme Court recognizes two (2) exceptions to this doctrine: "(1) breach of contract that the employee contends restricts the employers power to discharge, and (2) a public policy tort under Burk v. K-Mart, *supra*." Hayes, *supra*, at 782.

Morgan claims that Hilti discharged her in retaliation for her filing an EEOC complaint in 1994, in violation of Oklahoma public policy. This claim falls under the second exception to the at-will doctrine. The Oklahoma Supreme Court has stated the public policy exception is to be tightly circumscribed. Burk, *supra*, at 29. Morgan has failed to produce any evidence in support of her allegation that Hilti terminated her in retaliation for her filing an EEOC complaint. Furthermore, Morgan has failed to convince this Court it is or should be a violation of Oklahoma public policy to terminate an at-will employee for poor attendance. Summary judgment is hereby GRANTED with respect to Morgan's public policy violation claims.

IT IS SO ORDERED THIS 3<sup>rd</sup> DAY OF April, 1996.

A handwritten signature in cursive script, reading "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 3 1996

TANYA MORGAN,

Plaintiff,

vs.

HILTI, INC., a corporation in  
the state of New York,

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 95-C-608-B

ENTERED ON DOCKET

DATE APR 04 1996

**JUDGMENT**

In keeping with the Order sustaining Defendant's motion for summary judgment filed this date, Judgment is hereby entered in favor of the Defendant, Hilti, Inc., and against the Plaintiff, Tanya Morgan, and Plaintiff's action is hereby dismissed. The Defendant, Hilti, Inc., is hereby granted the costs of this action if timely applied for pursuant to Local Rule 54.1, and each party is to pay their own respective attorney fees.

DATED this 3rd day of April, '1996.

  
THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

37

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM C. ADDINGTON,

Plaintiff,

vs.

No. 94-C-761-B

DEWEY JOHNSON, Individually  
and in his official capacity  
as Sheriff of Rogers County,  
ROGERS COUNTY, JIM HICKS,  
Individually and in his official  
capacity as Undersheriff of  
Rogers County, and JOHN DOES  
I - X, Individually and in their  
official capacities as Jailers  
of Rogers County,

Defendants.

**FILED**

APR - 3 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 04 1996

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Application filed herein, the parties have stipulated that all questions and issues existing between the said parties have been fully and completely disposed of by settlement and have requested the entrance of an order of dismissal with prejudice.

IT IS SO ORDERED that the case should be and the same is hereby dismissed with prejudice and the matter fully, finally and completely disposed of.

DATED this 3<sup>rd</sup> day of April 1996.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

**CERTIFICATE OF MAILING**

I, **RAY H. WILBURN**, hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 1996, a true and correct copy of the above and foregoing Order of Dismissal with Prejudice was mailed, with proper postage thereon fully prepaid, to: Ray H. Wilburn, 7134 S Yale Ave., STE 560, Tulsa, OK 74136-6337.

\_\_\_\_\_  
SANDRA TOLLIVER

**FILED**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**APR 3 1996**

BRYAN E. ENGLER,

Plaintiff,

vs.

DILLARD DEPARTMENT STORES,  
INC.,

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 96-CV-0061-BU

ENTERED ON DOCKET

DATE **APR 04 1996**

**AGREED ORDER OF DISMISSAL**

Upon joint motion of Plaintiff and Defendant, the Court finds that the parties have stipulated as to the dismissal of this action with prejudice. IT IS, THEREFORE,

ORDERED that the above entitled action shall be and is hereby dismissed with prejudice, with each party to bear its own costs and attorneys fees.

Dated this 3<sup>rd</sup> day of <sup>April</sup> ~~March~~, 1996.


s/ MICHAEL BURRAGE

Honorable Michael Burrage  
United States District Judge

APPROVED AS TO FORM AND CONTENT:

DOERNER, SAUNDERS, DANIEL & ANDERSON

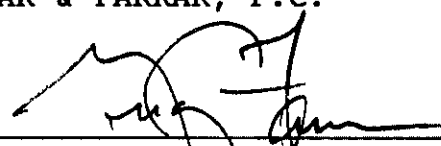
By:

  
Richard H. Foster, OBA No. 3055  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for Defendant  
Dillard Department Stores, Inc.

FARRAR & FARRAR, P.C.

By:

  
Greg A. Farrar, OBA No. 2832  
717 South Houston  
Suite 502  
Tulsa, Oklahoma 74127  
(918) 587-7441

Attorneys for Plaintiff  
Bryan E. Engler

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

DRESSER ENGINEERS &	§
CONSTRUCTORS, INC., and	§
DRESSER ENGINEERING COMPANY,	§
Plaintiffs,	§
	§
v.	§
	§
DRESSER INDUSTRIES, INC.,	§
Defendant	§
	§
DRESSER INDUSTRIES, INC.	§
Plaintiff,	§
	§
v.	§
	§
DRESSER ENGINEERS &	§
CONSTRUCTORS, INC. and	§
WILLIAM C. MORRIS,	§
Defendants.	§

**FILED**

APR 3 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION

NO. 95-C-592BU

ENTERED ON DOCKET

DATE APR 04 1996

CIVIL ACTION

NO. 95-C-1048BU

**AGREED JUDGMENT**

All parties, Dresser Engineers & Constructors, Inc. ("DECI"), Dresser Engineering Company ("DEC"), William C. Morris ("Morris"), and Dresser Industries, Inc. ("DI"), having entered into an agreement settling their claims (the "Settlement Agreement," Exhibit A hereto), and by their "Joint Motion For Judgment" moved for the entry of this Agreed Judgment, it is ORDERED, ADJUDGED, FOUND, AND DECREED that:

1. DEC has the right under ~~the~~ Lanham Act to register and use the mark "Dresser Engineering" for the type of engineering and construction services that DEC and its predecessors have previously performed ("engineering and construction services");

2. DEC and its predecessors have continuous and prior use of the mark "Dresser Engineering" for engineering and construction services from 1926, and no likelihood of confusion exists between DEC's use of ~~the~~ mark "Dresser Engineering" and DI's present use of the name "Dresser" in connection with M.W. Kellogg Company;

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3. DI is not presently using, **and does** not claim that it has used, "Dresser" in the United States for the type of engineering **and** construction services performed by DEC, other than as currently used in conjunction with M.W. Kellogg Company as an indication of ownership, such as the type of use **generally** depicted in the attached Exhibit "MWK";

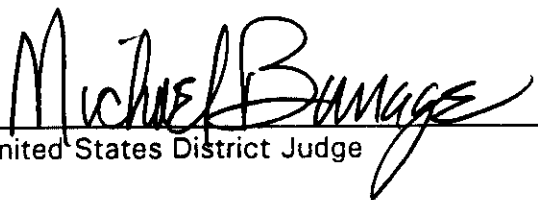
4. DI's U.S. trademark registrations Nos. 556,039; 855,814; 1,396,487; and 1,536,088 are valid, and that there is **not now**, nor has there been, any likelihood of confusion caused by DEC's use of the "Dresser" name;

5. No appeal shall be taken **by any party** from this Agreed Judgment, the right to appeal being expressly waived by all Parties;

6. This Agreed Judgment **shall finally** conclude and dispose of this litigation and shall be entitled to both res judicata and **collateral** estoppel effect, and that all relief requested by any party and not expressly granted **herein** or expressly reserved is hereby and in all things denied with prejudice; and

7. All issues pertaining to **damages**, costs and attorneys' fees having been settled by the parties, none of the parties **herein shall** recover any damages, costs or attorneys' fees and each party shall bear its own costs **and** attorneys' fees.

SIGNED this 3<sup>rd</sup> day of April, 1996.

  
United States District Judge



business in different markets; and

WHEREAS the Parties desire to settle the above-referenced civil actions to preserve the pre-existing condition of nonconfusion and also to avoid conflict, likelihood of confusion and infringement in the future.

NOW, THEREFORE, for and in consideration of the mutual covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. The Parties agree to the immediate entry of an "Agreed Judgment" in the form attached hereto as Exhibit "A." The Parties agree to immediately move for the entry of such "Agreed Judgment" by motion in the form of the "Joint Motion For Judgment" attached hereto as Exhibit "B."

2. The Parties agree that DEC has the right under the Lanham Act to register and use the mark "Dresser Engineering" for the type of engineering and construction services that DEC and its predecessors have previously performed ("engineering and construction services").

3. The Parties stipulate that DEC and its predecessors have continuous and prior use of the mark "Dresser Engineering" for engineering and construction services from 1926, and that no likelihood of confusion exists between DEC's use of the mark "Dresser Engineering" and DI's present use of the name "Dresser" in connection with M.W. Kellogg Company. DI is not presently using, and does not claim that it has used, "Dresser" in the United States for the type of engineering and construction services performed by DEC, other than as currently used in conjunction with M.W. Kellogg Company as an indication of ownership, such as the type of use generally depicted in the attached Exhibit "MWK."

4. The Parties stipulate that DI's U.S. trademark registrations Nos. 556,039; 855,814; 1,396,487; and 1,536,088 in issue in these cases are valid and that there is not

now, nor has there been, any likelihood of confusion caused by DEC's use of the "Dresser" name.

5. DEC is not required by this Settlement Agreement to state in its promotional, marketing, and contractual materials that DEC is either: (1) a division or subsidiary of another company whose name does not include the word "Dresser"; or (2) "not affiliated with Dresser Industries." However, should DEC choose at its sole discretion to include such a statement in its promotional, marketing, and contractual materials, DI agrees not to sue DEC or take any legal action against DEC for its use of the mark "Dresser Engineering" for engineering and construction services anywhere in the world where such use is accompanied by the statement. DI shall give DEC notice and a reasonable opportunity to implement this provision before DI pursues legal action against DEC.

6. The Parties agree this Settlement Agreement does not constitute an admission as to their respective rights other than as expressly set forth herein, and the Parties agree that this Settlement Agreement shall not be admissible in evidence in any proceeding for any purpose other than enforcement of this Settlement Agreement.

7. DI consents to, and agrees not to take any action or proceedings legal or otherwise which will hinder or disturb DEC's right under the Lanham Act to register the mark "Dresser Engineering" for engineering and construction services.

8. The Parties agree that, in the light of the specific circumstances of the Parties and their respective histories, predecessors and lines of business, compliance with this Settlement Agreement will prevent conflict between the Parties' respective marks and preclude a likelihood of confusion between the marks.

9. This Settlement Agreement constitutes the entire agreement between the Parties relating to the subject matter hereof and supersedes all prior negotiations, understandings, and agreements, if any.

10. This Settlement Agreement may not be released, discharged, abandoned, changed, or modified in any manner, orally or otherwise, except by an Instrument in writing signed by each of the Parties hereto.

11. This Settlement Agreement shall be binding upon and for the benefit of all of the Parties hereto, their subsidiaries, affiliates, related companies, parents, assigns, heirs, executors, administrators, representatives, agents, attorneys, directors, employees, successors, assigns, and the officers and principals of the Parties in their individual capacities and their successors and assigns.

12. Each person executing this Settlement Agreement on behalf of any corporate entity represents and warrants that he or she has the power and authority to execute this Settlement Agreement on behalf of such corporate entity, and that the entry into this Settlement Agreement and his or her execution of this Settlement Agreement are the duly authorized acts of such corporate entity.

13. This Settlement Agreement may be executed in counterparts, and each such counterpart shall be deemed the equivalent of any original thereof upon the execution of this Settlement Agreement by all Parties. This Settlement Agreement, including the agreement to the entry of the "Agreed Judgment," shall be conditioned upon execution of the Settlement Agreement by all of the Parties hereto.

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed by their duly authorized officers or representatives on the day and year indicated:

Executed this 29th day of MARCH, 1996:

  
DRESSER INDUSTRIES, INC.

By: CLINT ABLES  
[Print name]

Its: VICE PRESIDENT AND GENERAL COUNSEL  
[Title]

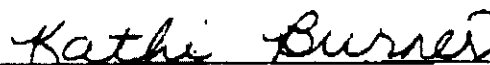
STATE OF TEXAS §

COUNTY OF DALLAS §

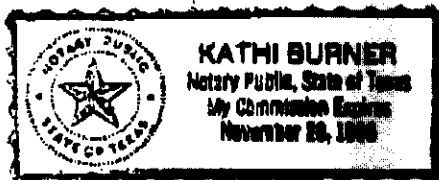
On this 29th day of MARCH, 1996 before me personally came CLINT ABLES, to me known, who, being duly sworn, did depose and say that he is VP-GENERAL COUNSEL of Dresser Industries, Inc., the corporation described in and which executed the above Settlement Agreement, that he has authority to act on behalf of said corporation, and that he signed his name to this Settlement Agreement on behalf of said corporation.

KATHI BURNER

Printed Name of Notary

  
Notary Public in and for the  
State of Texas

My Commission Expires \_\_\_\_\_



Executed this 1 day of April, 1996:

John W. Adair  
DRESSER ENGINEERS &  
CONSTRUCTORS, INC.

By: JOHN W. ADAIR  
[Print name]

Its: President, CEO  
[Title]

STATE OF Oklahoma §  
COUNTY OF Tulsa §

On this 1 day of April, 1996 before me personally came JOHN W. ADAIR to me known, who, being duly sworn, did depose and say that he is President CEO of Dresser Engineers & Constructors, Inc., the corporation described in and which executed the above Settlement Agreement, that he has authority to act on behalf of said corporation, and that he signed his name to this Settlement Agreement on behalf of said corporation.

Nicole L. McFERRIN  
Printed Name of Notary  
Nicole L. McFerrin  
Notary Public in and for the  
State of Texas

My Commission Expires 10-16-99

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 1996:

John W. Adair  
DRESSER ENGINEERING COMPANY

By: John W. Adair  
[Print name]

Its: President CEO  
[Title]

STATE OF Oklahoma §  
COUNTY OF Tulsa §

On this 1 day of April, 1996 before me personally came John W. Adair to me known, who, being duly sworn, did depose and say that he is President, CEO of Dresser Engineering Company, the corporation described in and which executed the above Settlement Agreement, that he has authority to act on behalf of said corporation, and that he signed his name to this Settlement Agreement on behalf of said corporation.

Nicole L. McFerrin  
Printed Name of Notary

Nicole L. McFerrin  
Notary Public in and for the  
State of ~~Texas~~ OKLAHOMA

My Commission Expires 10-16-99

Executed this 1st day of April, 1996:

William C. Morris  
WILLIAM C. MORRIS

STATE OF OKLAHOMA §  
COUNTY OF TULSA §

On this 1 day of April, 1996 before me personally came William C. Morris, to me known, who, being duly sworn, did depose and say that he signed his name to this Settlement Agreement in his individual capacity.

Nicole L. McFERRIN  
Printed Name of Notary  
Nicole L. McFerrin  
Notary Public in and for the  
State of Texas

My Commission Expires 10-16-99

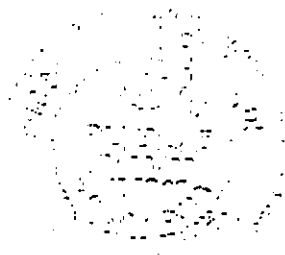


EXHIBIT "MWK"

# The next generation of ammonia plants is here

In the 60s, M.W. Kellogg pioneered the single-train, large-scale ammonia process, revolutionizing ammonia production worldwide.

We're revolutionizing it again.

We've combined an innovative ammonia synthesis methodology we call the Kellogg Advanced Ammonia Process - KAAP - with a breakthrough approach to classic steam reforming known as the Kellogg Reforming Exchanger System, or KRES. We're as committed as ever to making the best better.



The Kellogg Advanced Ammonia Process uses a high-activity catalyst for increased ammonia concentrations.



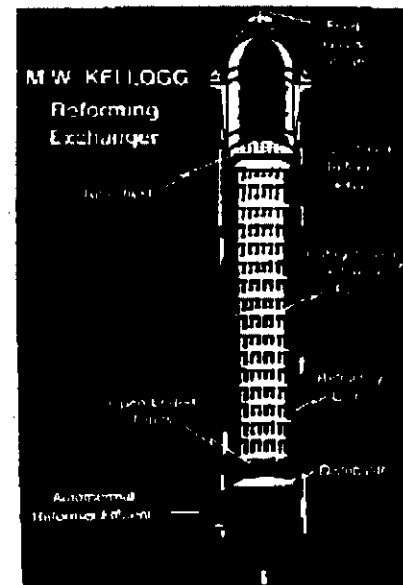
The first commercial-scale KAAP unit was installed at Methanex Corporation's Oxyne Ammonia Company plant in Kitimat, British Columbia. Coupled with KRES, KAAP sets the stage for the next generation of ammonia plants.

#### The Combined Benefits are Clear

- Lower Capital Investment
- Lower Operating Costs
- Reduced Energy Consumption
- Higher Efficiency
- Reduced Maintenance Costs
- Improved Safety and Reliability
- Reduced Plant Emissions

The Kellogg Advanced Ammonia Process uses the first non-iron catalyst successfully applied in the commercial production of ammonia. KAAP offers high catalyst activity at low pressures, with correspondingly low hydrogen-to-nitrogen ratios.

The Kellogg Reforming Exchanger System uses an open tube exchanger design. Energy for the reforming exchanger is supplied entirely through heat exchanges with the hot gas effluent from the secondary reformer.



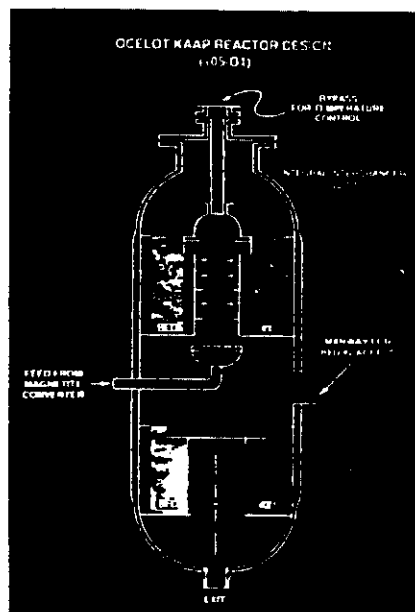
The Kellogg Reforming Exchanger System eliminates the fired primary reformer furnace from the production process entirely.

# The next generation of ammonia plants is here

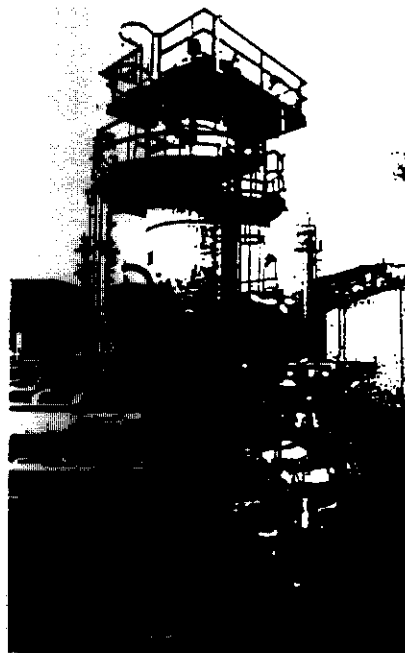
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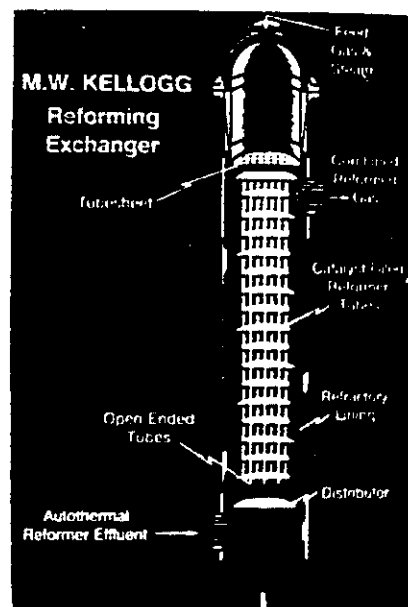
*The first commercial-scale KAAP unit was installed at Methanex Corporation's Ocelot Ammonia Company plant in Kitimat, British Columbia. Coupled with KRES, KAAP sets the stage for the next generation of ammonia plants.*

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The Kellogg Reforming Exchanger System eliminates the fixed primary reformer furnace from the production process entirely.



## The M.W. Kellogg Company

A Unit of M.W. Kellogg, Inc. • A Subsidiary of Dresser Industries, Inc.

World Headquarters: 601 Jefferson Ave. • P.O. Box 4557 • Houston, Texas 77210-4557  
Phone: 1-713-753-2000 • Telex: 166385 MWKHOC • Fax: 1-713-753-5353

European Subsidiary: M.W. Kellogg Limited • Stadium Way • Wembley, Middlesex, England HA9 0EE  
Phone: 44-181-795-7000 • Telex: 8813451 MWK LDN G • Fax: 44-181-861-1688

© 1995, The M.W. Kellogg Company

Offices, subsidiaries and affiliates throughout the world



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
APR 04 1996  
DATE

TERRELL WILLIAMSON,

SSN: 344-26-3975,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner

Social Security Administration,

Defendant.

NO. 94-C-670-M

**F I L E D**

**APR 8 1996**


Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

Plaintiff has applied for an award of attorney's fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The Defendant, Commissioner of the Social Security Administration, has advised the Court she has no objection to an award of \$1,386.92 as requested by Plaintiff.

The Court finds that the fee enhancement for the cost-of-living included in Plaintiff's fee request is appropriate and the number of hours expended is reasonable. Accordingly, Plaintiff's motion for fees and costs pursuant to 28 U.S.C. § 2412(d) [Dkt. 9] is GRANTED in the amount of \$1,386.92.

SO ORDERED THIS 3<sup>rd</sup> day of, April, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

DAVID R. MARSHALL,

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of Social Security,<sup>1</sup>

Defendant.

APR - 3 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No: 94-C-1185-W

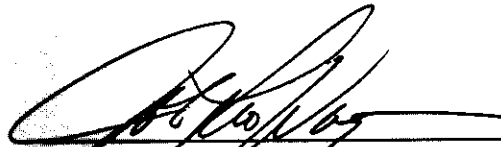
ENTERED ON DOCKET

DATE APR 04 1996

**JUDGMENT**

Judgment is entered in favor of the Plaintiff, David R. Marshall, in accordance  
with this court's Order filed April 3, 1996.

Dated this 3<sup>rd</sup> day of April, 1996.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DAVID R. MARSHALL,

Plaintiff,

v.

SHIRLEY S. CHATER,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

Case No. 94-C-1185-W

**FILED**

**APR - 3 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

**APR 04 1996**

DATE \_\_\_\_\_

**ORDER**

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under § 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Stephen C. Calvarese (the "ALJ"), which summaries are incorporated herein by reference.

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<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.<sup>2/</sup>

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.<sup>3/</sup> He found that claimant had been denied social security benefits once before, on August 17, 1990, and that this was the final decision of the Secretary on the application of April 15, 1988. He also found that claimant met the disability insured status requirements of the Act on August 18,

---

<sup>2</sup>Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

<sup>3</sup> The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

1990, the day after the previous **denial**, and continued to meet them through September 30, 1992. He then determined that, prior to May 3, 1993, claimant had the residual functional capacity to perform sedentary and light work, limited by 20/25 vision in the right eye and 20/40 vision in the left eye.

The ALJ concluded that claimant had a normal stable gait, can walk on heels and toes without difficulty, can walk a mile, has occasional chest pain with sitting, lying, and occasionally with mild exertion once a month for 1-2 seconds, uses nitroglycerine one to three times a year, and has shortness of breath with chest pain. The ALJ noted that claimant was 55, which is defined as advanced age, has a masters degree, and has done past relevant work ranging from unskilled to skilled.

The ALJ found that claimant's impairments did not prevent him from performing his past relevant work as a cashier or a security guard prior to May 3, 1993, but since May 3, 1993, he was disabled by throat cancer which met the requirements of the Listing of Impairments, Section 13.02. Having determined that claimant's impairments did not prevent him from performing his past relevant work prior to December 1, 1992, the ALJ concluded that he was not disabled under §§ 216(i) and 223 of the Social Security Act prior to that date, but was disabled under § 1614(a)(3)(A) after May 3, 1993.

Claimant now appeals the part of the ruling finding no disability prior to May 3, 1993 and asserts alleged errors by the ALJ:

- (1) The ALJ did not address claimant's complaints of fatigue and inability to deal with stress as being nonexertional impairments which prevent him from working.

- (2) The ALJ erred in finding that claimant could do light work, which requires standing or walking for six hours a day on a sustained basis.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The ALJ concluded that evidence establishes that claimant has chest pain, shortness of breath, and, commencing on May 3, 1993, neck and throat cancer (TR 25). However, he concluded that claimant could work through December 1, 1992. The ALJ found that claimant's daily activities are as follows: "He will go to the Iron Gate for breakfast, he will ride a bus or ride his bicycle, he can ride up to 2 miles a day. He can dress and bathe himself. He does a few household chores and some light cooking. He washes dishes and sweeps, he will also do laundry, but no more than twice a year. He goes shopping . . . ." (TR 20). He observed that claimant watched television three to eight hours a day, reads quite a bit, and has difficulty sleeping. (TR 20).

Claimant testified regarding his daily activities as follows:

Q Now, at the present time, what are your daily activities? What do you do in a normal day?

A I wake up around daylight, go to the Iron Gate for breakfast. They serve between 8:30 and 10:30. Then, usually go to the grocery store, then back home.

Q Do you walk these places or drive these places?

A I ride a bus. If I feel pretty good that day, I will ride a bicycle.

Q How far do you ride a bike on a normal day?

A A mile. A day, a whole day, maybe two miles.

Q Do you dress and bathe yourself?

A Yes.

Q Do you do any household chores?

A Very few.

Q Which ones do you do?

A Like, cooking for myself, dishwashing.

Q Anything else besides that?

A Once in a great while, a little sweeping. Once in a great while, a little picking up.

Q Do you do any laundry?

A Very seldom. Once or twice a year. (TR 50-51).

Claimant testified that fatigue **was** the number one problem that kept him from working (TR 55). His disability application stated that he cannot work because of "no stamina, no endurance, no stress tolerance." (TR 287). He stated that he tires out or wears down doing anything that **"pertains** to staying alert and awake in the course of a day." (TR 56). He takes a nap **once** or twice a day for thirty minutes to two to three hours and sleeps eight to **fourteen** hours in a 24-hour period (TR 60). He testified that he could not do a job **requiring** sitting for six hours out of eight hours every day of the week because it **would** damage his health in that it would fatigue him too much to be able to cook for **himself**. (TR 62).

Claimant's testimony was **supported** by the medical records. He had heart attacks in 1978 and 1988 (TR 345). In March of 1988, he underwent coronary bypass surgery (TR 192, 341). In July of 1989, his treating doctor, Dr. H.K. Speed, stated: "[H]is heart disease has **been** fairly stable.... He complains only of fatigue which he feels is increased by any **stress**. David states that he does not handle stress and that stress has caused **him** to quit his job in the past. Stress could possibly make his heart disease worse." (TR-192). In December of 1990, Dr. Speed

noted that claimant was "still fatigued and dizzy" (TR 310).

Claimant was seen at Morton Health Clinic on February 5, 1991, and reported occasional chest pain, fainting, dizziness, daily shortness of breath, and ankle swelling when walking (TR 343). He was treated at the clinic several times during 1991 for high cholesterol (TR 333-336). In May of 1992, Dr. Betty Conrad examined claimant, noted that he told her he had had very little stamina and tended to feel dizzy since his bypass surgery, and concluded that he had a slow pulse and might benefit from a pace maker (TR 388).

Claimant had an abnormal treadmill test in December of 1992 (TR 345). While the test revealed no angina and his heart rate remained regular, the EKG showed some changes: "By three minutes there was a beginning ST segment flattening in lead V5. At maximum there was one half mm ST segment depression in V5 with less in V6. There are also some T wave changes in the inferior leads as well. (TR 345).

Claimant was seen by Dr. Susan Steele on February 9, 1993 (TR 391-399). She noted that claimant admitted to "shortness of breath and fatigue with exertion greater than a mile . . . . (TR 392). She stated that the December 1992 diagnostic tests were not available to review (TR 392). She found that he had a normal heart rhythm, but mild ectopics and murmurs (TR 392). She heard a carotid bruit, or blood sound, in the neck and femurs (TR 392-93).

It is significant that a vocational expert testified that claimant could do his past jobs as a cashier and security guard if he was limited to sedentary or light work, could walk a mile, and had occasional mild chest pain and shortness of breath once

a month (TR 74-75). However, when asked if claimant could work if it was assumed that his testimony was fully credible, the vocational expert said no, because:

I think the main restriction that I see, as far as observing today and also from the testimony, is fatigue. It seems like that he fatigues real easy. He gives that effect sitting here today during the testimony. He indicates that he can't do a six-hour-a-day sitting job because of the fatigue. He couldn't do a standing job because of this, also. In relying on talking, he gets hoarse. Most of the jobs that we described in the sedentary, light area do require a considerable amount of talking, especially the ones I described. And he wouldn't be able to do that over an eight-hour day. He's slow in his speech. I don't know if that's related to his thinking or what. But the combined testimony and -- that he had given today, he just doesn't appear to me to be employable if I was an employer, Your Honor. I don't think I'd give him a chance.

(TR 75-76).

The ALJ discounted claimant's symptoms and relied heavily on Dr. Steele's report because it was "the only full physical examination performed prior to May 3, 1993 . . . ." (TR 22). He noted that Dr. Steele found no restrictions on claimant's physical capabilities and was advised he could "walk at least a mile." (TR 22). He concluded that claimant's physical capacity was "understated" by him, when compared with the results of Dr. Steele's examination (TR 22).

An ALJ must consider all factors that might have a significant impact on an individual's ability to work. Erickson v. Shalala, 9 F.3d 813, 817 (9th Cir. 1993). The court in Erickson concluded that the medical expert erred in failing to consider whether a claimant's condition as a whole, including fatigue and dizzy spells, would interfere with his ability to do light work. Id. at 818.

The Tenth Circuit in Hamilton v. Secretary of Health & Human Servs., 961 F.2d

1495 (10th Cir. 1992), examined claimant's contention that the ALJ ignored his complaints of disabling fatigue and concluded that the ALJ properly considered objective evidence in the record, such as claimant's recounting of his daily activities, and the fact that he rested only one hour a day.

There is merit to claimant's contentions. The record does not contain any meaningful evidence to support a finding that claimant did not suffer from a significant level of fatigue on a regular basis. Claimant's recounting of his daily activities and sleep patterns support his contention that he suffers greatly from fatigue (TR 50-60). He reported fatigue to his doctors numerous times, and no doctor found the complaints not credible (TR 192, 310, 388, 392). Certainly such a complaint could be related to the objective evidence of heart and circulation problems. Even the vocational expert observed his fatigue (TR 75). This is not a case, such as Hamilton, where "no medical evidence supports claimant's allegations of fatigue" and thus his subjective complaints alone are not sufficient to establish the impairment. Id. at 1499.

In Sparks v. Bowen, 807 F.2d 616, 616-17 (7th Cir. 1986), the claimant contended that her heart abnormalities caused disabling pain and fatigue, and the court concluded: "pain and fatigue associated with a medically ascertainable cause may disable a person for purposes of the Act." The court noted that 42 U.S.C. § 423(d)(5)(A) states that pain and related symptoms may be considered if medical evidence shows "the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to

produce the pain or other symptoms **alleged.**” Sparks complained that she stopped working because of pain and fatigue, and tests showed that she had anomalous heart rhythms, arrhythmia, and tachycardia, but doctors could not identify a cause for these, and she had not suffered a heart attack and did not have coronary heart disease.

The ALJ in Sparks had concluded that claimant was not entitled to disability benefits because she had not demonstrated that her pain had a physiological cause, which 20 C.F.R. § 404.1529 and 42 U.S.C. § 423(d)(5)(A) require. The ALJ did not consider whether § 423(d)(5)(A) demands that a claimant prove the etiology of her condition, or only that she have medically ascertainable conditions that are likely to be associated with symptoms, such as pain and fatigue. The Seventh Circuit in Sparks concluded:

The statutory requirement of an impairment linked to an abnormality that could reasonably be expected to cause the symptoms in question does not imply that the claimant **must** show what caused her abnormality. The etiology of many medical conditions is obscure; symptoms are easier to study than are causes. That physicians do not know why a person has a condition does not make that condition any less disabling.

Neither the statute nor the regulation visits claimants with the consequences of shortfalls in medical knowledge, once the impairment is accompanied by objective indicia. No legislative history suggests that § 423(d)(5)(A) is designed to compel claimants to show a medical cause for a medically ascertainable abnormality. The requirement that a claimant show an objectively verifiable abnormality is designed to screen out claims by hypochondriacs and goldbricks. No claim may be allowed without medical evidence showing that the complaint has an ascertainable cause. But once there is evidence of an objectively demonstrated abnormality and either "(1) . . . objective medical evidence [confirms] the severity of the **alleged** pain arising from that condition or (2) the objectively determined medical condition [is] of a severity which

can reasonably be expected to give rise to the alleged pain," S.Rep. No. 98-466, 98th Cong., 2d Sess. 24 (1984), the requirement of § 423(d)(5)(A) is fulfilled.

Objective medical evidence shows that Sparks has physiological abnormalities of the heart. There is no direct medical evidence to support her claim of pain and fatigue. But if arrhythmia and tachycardia of the sort that afflict Sparks "could reasonably be expected to produce the pain or other symptoms" of which she complains, that will suffice for purposes of § 423(d)(5)(A). The ALJ stopped with his error about the nature of the medical abnormality requirement and did not decide whether Sparks's condition "could reasonably be expected to produce" her pain and exhaustion. (citations omitted)

*Id.* at 618. See also, Jackson v. Bowen, 873 F.2d 1111, 1113-1114 (8th Cir. 1989).

The ALJ in this case erred in failing to consider whether claimant's heart abnormalities could reasonably be expected to cause a nonexertional impairment<sup>4/</sup> of fatigue, for which evidence existed. See, Thompson v. Sullivan, 987 F.2d, 1482, 1489 (10th Cir. 1993). The case should be remanded to consider this issue.

The ALJ should then reconsider his conclusion that claimant had the residual functional capacity to do light work. "Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very

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<sup>4</sup> Defendant argues that fatigue should not be considered a "nonexertional impairment." Fatigue is similar to pain, in that its existence is not readily ascertainable from objective observation or testing. Like pain, the presence of fatigue can usually only be inferred circumstantially from the presence of objectively ascertained medical condition(s) from which fatigue can be reasonably expected to result. The Tenth Circuit has discussed fatigue in a nonexertional context. See, Hamilton v. Secretary of Health & Human Services of the United States, 961 F.2d 1495 (10th Cir. 1992).

heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. "Light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds . . . . [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b).

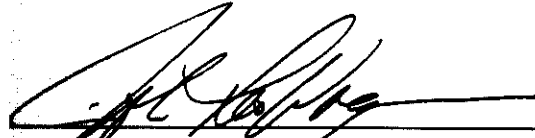
Sedentary work involves:

lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 404.1567.

Social Security Ruling 83-10 has defined "occasionally" in the context of sedentary work as "occurring from very little up to one-third of the time." The Ruling further states, "Since being on one's feet is required 'occasionally' at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday." S.S.R. 83-10.

This case is remanded to determine whether claimant's heart abnormalities could reasonably be expected to produce his exhaustion and, if so, whether he was capable of doing light or sedentary work from August 18, 1990, through September 30, 1992.

Dated this 3<sup>rd</sup> day of April, 1996.

A handwritten signature in black ink, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:marshal.ord

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR - 3 1996

FRANK NORRIS GOODMAN, JR. and )  
CHERYL GOODMAN, )

Plaintiffs, )

v. )

STRATFORD INSURANCE COMPANY, a )  
foreign corporation, )

Defendant. )

No. 95-C-532-E

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 04 1996

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 3<sup>rd</sup> day of April, 1996, it appearing to  
the court that this matter has been compromised and settled, this  
case is herewith dismissed with prejudice to the refiling of a  
future action.

S/ JAMES O. ELLISON

United States District Judge

DATE 4-4-96

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,  
PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H

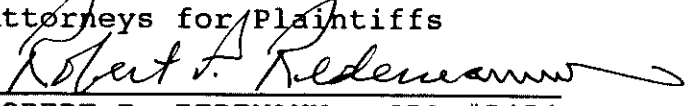
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Bradley Berry, Debra Berry and Shawna Berry, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE

4-4-96

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**FILED****APR - 2 1996**Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Mark Anderson, Jr., Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
APR - 2 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

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DEFENDANTS.

CASE NO. 94-C-1059-H

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4-4-96

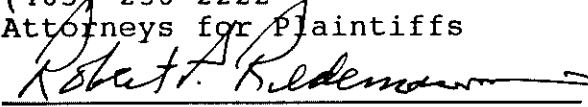
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Brandi Wilson, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

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DATE 4-4-96

**FILED**

**APR - 2 1996**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

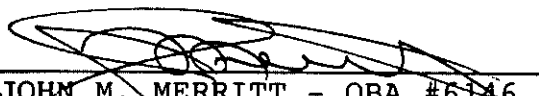
CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Michael Owens, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-4-96IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**F I L E D****APR - 2 1996**

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Charles Saulters, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
 JOHN M. MERRITT - OBA #6146  
 Merritt & Rooney, Inc.  
 P.O. Box 60708  
 Oklahoma City, OK 73146  
 (405) 236-2222  
 Attorneys for Plaintiffs

  
 ROBERT P. REDEMANN - OBA #7454  
 Rhodes, Hieronymus, Jones  
 Tucker & Gable  
 2800 Fourth National Bank Bldg.  
 Tulsa, OK 74119  
 Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
**APR - 2 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H  
ENTERED ON DOCKET  
DATE 4-4-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Christopher Tanis, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-4-96

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**APR - 2 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al., )  
 )  
 PLAINTIFFS, )  
 )  
 vs. )  
 )  
 SUN COMPANY, INC., (R&M), a Pennsyl- )  
 vania corporation; and SUN COMPANY, )  
 INC., a Pennsylvania corporation, )  
 )  
 DEFENDANTS. )


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Gary Treat, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

**FILED**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**APR - 2 1996**

IDELL WARD, et al.,

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SUN COMPANY, INC., (R&M), a Pennsyl-  
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Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 94-C-1059-H

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DATE 4-4-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Donald Smith, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT  
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vs.

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DEFENDANTS.


CASE NO. 94-C-1059-H

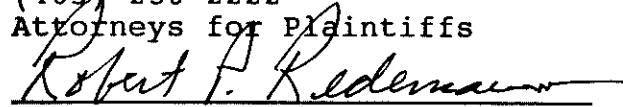
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Violet Smith, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**APR - 2 1996**

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IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Martha Matthews, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-4-96IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

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INC., a Pennsylvania corporation, )

DEFENDANTS. )


CASE NO. 94-C-1059-H

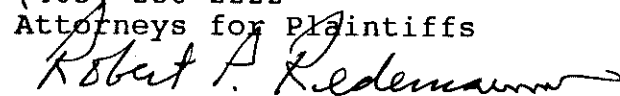
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Norman McCully, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
 JOHN M. MERRITT - OBA #6146  
 Merritt & Rooney, Inc.  
 P.O. Box 60708  
 Oklahoma City, OK 73146  
 (405) 236-2222  
 Attorneys for Plaintiffs

  
 ROBERT P. REDEMANN - OBA #7454  
 Rhodes, Hieronymus, Jones  
 Tucker & Gable  
 2800 Fourth National Bank Bldg.  
 Tulsa, OK 74119  
 Attorneys for Defendants

FILED

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

CASE NO. 94-C-1059-H

ENTERED ON DOCKET

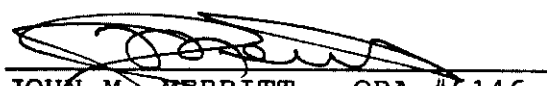
DATE 4-4-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Linda McCully, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

**F I L E D**

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

**APR - 2 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

CASE NO. 94-C-1059-H

ENTERED ON DOCKET


DATE 4-4-96


**PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE**

COME(S) NOW the Plaintiff, Louise McCrackin, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-4-96IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**FILED****APR - 2 1996**Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.



CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, **Pat Grubb, only** and the defendants,  
**SUN COMPANY, INC. (R&M), and SUN COMPANY INC.,** pursuant to  
Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims  
of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed  
against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own  
costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

4-4-96

FILED

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, **Natalyn Abbey, Minor, only** and the defendants, **SUN COMPANY, INC. (R&M)**, and **SUN COMPANY INC.**, pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-4-96

FILED

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

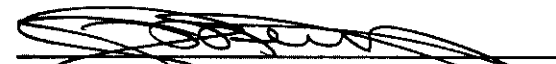
CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, **Eloise Nelson**, as surviving spouse and next of kin of **Leonard Nelson**, deceased, only and the defendants, **SUN COMPANY, INC. (R&M)**, and **SUN COMPANY INC.**, pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-4-96

FILED

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURTIN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMAIDELL WARD, et al.,  
PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

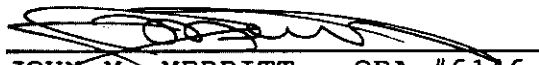

CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Justin Hendrickson, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-4-96

**FILED**

**APR - 2 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsylv-  
ania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H

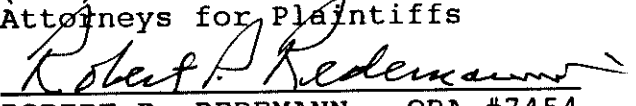
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Jason Hendrickson, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET  
DATE 4-4-96

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**APR - 2 1996**

IDELL WARD, et al.,  
PLAINTIFFS,

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

vs.

SUN COMPANY, INC., (R&M), a Pennsylv-  
ania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

CASE NO. 94-C-1059-H


DEFENDANTS.


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Kelly Ward and Idell Ward, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-4-96**FILED****APR - 2 1996**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMAIDELL WARD, et al.,  
PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Jennifer Smedley and Lance Smedley, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
 JOHN M. MERRITT - OBA #6146  
 Merritt & Rooney, Inc.  
 P.O. Box 60708  
 Oklahoma City, OK 73146  
 (405) 236-2222  
 Attorneys for Plaintiffs

  
 ROBERT P. REDEMANN - OBA #7454  
 Rhodes, Hieronymus, Jones  
 Tucker & Gable  
 2800 Fourth National Bank Bldg.  
 Tulsa, OK 74119  
 Attorneys for Defendants

DATE 4-4-96IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**F I L E D****APR - 2 1996**

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Pamela Slater and Donald Slater, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed. R. Civ. P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET

DATE 4-4-96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 3 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GILBERT R. SUITER,

Plaintiff,

v.

Case No. 93-C-815-H ✓

MITCHELL MOTOR COACH SALES,  
INC., a Florida corporation, et al.

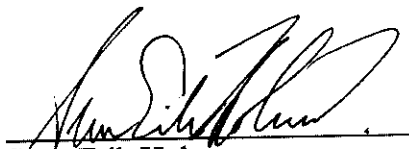
Defendants.

**JUDGMENT**

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Plaintiff Gilbert R. Suiter in the amount of \$78,858.00 plus reasonable attorney's fees in an amount to be determined by the Court, and against Defendant Mitchell Motor Coach Sales, Inc. Further, the Court hereby enters a judgment of default against the Estate of Robert Desbien and in favor of Plaintiff Gilbert R. Suiter in the amount of \$78,858.00 plus reasonable attorney's fees in an amount to be determined by the Court.

IT IS SO ORDERED.

This 3<sup>RD</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET

DATE 4-4-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR - 3 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DANIEL J. SANDERS; JOHNNIE )  
SANDERS; TRAVIS R. ROBERTSON; )  
REBECCA A. ROBERTSON; RICHARD )  
M. LABAT; REBECCA J. LABAT; )  
HOWARD M. BOOS; MICHAEL J. IVES; )  
ALICE JANE IVES; JOHN JACKSON; )  
GORDON D. GARRETT; RALPH E. )  
BAILEY; SHARON K. BAILEY; )  
WALTER E. KOSTICH, JR.; BUD L. )  
MITCHELL; REECIA J. MITCHELL; )  
TERRY ROSKAM; MONICA ROSKAM; )  
RICHARD E. HACKLER; TERRY )  
HACKLER; JOAN HACKLER; JAMES )  
LAMB; RHEA LAMB; WILLIAM JIRIK; )  
VACKEL BOSWELL; INA BOSWELL; )  
and CHARLENE R. REDDICK, )

Plaintiffs, )

v. )

Case No. 95-CV-105 ✓

COLLECTOR OF INTERNAL )  
REVENUE, ET. AL. JOHN DOES 1-10, )

Defendants. )

**ORDER**

This matter comes before the Court on Defendants' Motion to Substitute the United States as the Sole and Proper Defendant to this Action (Docket #2) and Defendants' Motion to Dismiss (Docket #6).

Plaintiffs brought this action, seeking damages for allegedly unauthorized collection actions by Defendants and refund of their taxes. Plaintiffs allege that the "Collector of Internal Revenue" and certain unidentified agents engaged in conduct constituting "fraud, coercion, and fear, causing a

mistake of law on the part of the Plaintiffs.” Pls.’ Resp. at 1. Specifically, Plaintiffs contend that “Defendants have refused to allow Plaintiffs to exercise their rights to revoke all [1040 Form] elections which treat the Plaintiffs as residents and not non-residents in connection with the United States.” *Id.* at 2. In their complaint, Plaintiffs describe themselves as “members of a class of non-resident alien individuals who at no time during the taxable year are engaged in a trade or business within the United States.” Complaint ¶ 1.

Defendants seek to substitute the United States as the sole Defendant in this action pursuant to Rule 21 of the Federal Rules of Civil Procedure, which provides:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

In determining whether an action is against the United States, the Court looks at the issues presented and the effect of the judgment that may be entered, not the party named as the defendant. *Louisiana v. McAdoo*, 234 U.S. 627, 629 (1914); *New Mexico v. Regan*, 745 F.2d 1318, 1320 (10th Cir. 1984). “If the relief sought against a federal officer in fact operates against the sovereign, then the action must be deemed as one against the sovereign.” *Regan*, 745 F.2d at 1320. Even if the Court assumes, as Plaintiffs contend, that Defendants were acting outside their authority when they committed the alleged wrongful acts, the relief sought by Plaintiffs would “require affirmative action by the sovereign or the disposition of sovereign property” in the form of tax refunds. *Id.* Thus, the Court concludes that substitution of the United States as the sole Defendant in this action is appropriate and such substitution is hereby ordered..

Because Plaintiffs’ suit is directed against the United States, the Court must determine whether the United States has consented to such a suit in this Court. As a sovereign, the United

States may not be sued without its express **consent**, and the terms of that consent define the subject matter jurisdiction of the federal courts. United States v. Dalm, 494 U.S. 596, 608 (1990). Plaintiffs allege that the Court has jurisdiction pursuant to 26 U.S.C. § 7433, which provides in pertinent part as follows:

**(a) In general.** -- If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

**(d) Limitations.** --

**(1) Requirement that administrative remedies be exhausted.** -- A judgment for damages shall not be awarded under [this section] unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

Under 301.7433-1(e) of the Treasury Regulations, an administrative claim for damages under Section 7433 must be sent in writing to the District Director of Internal Revenue of the district in which the taxpayer currently resides. Such an administrative claim must include the following information:

- (i) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claim;
- (ii) The grounds, in reasonable detail, for the claim (including copies of any available substantiating documentation or correspondence with the Internal Revenue Service);
- (iii) A description of the injuries incurred by the taxpayer filing the claim (including copies of any available substantiating documents or evidence);
- (iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable; and
- (v) The signature of the taxpayer or his or her duly authorized representative.

Treas. Reg. § 301.7433-1(e)(2).

Plaintiffs allege that they have **exhausted** these administrative remedies by virtue of the codicils attached to their complaint. These **codicils** basically constitute claims sent to the Internal Revenue Service attempting to revoke their **resident** status as listed on prior 1040 Forms. Clearly, however, they do not meet the criteria **set forth** in Treas. Reg. § 301.7433-1(e)(2). Therefore, the Court does not have jurisdiction under **Section 7433(d)(1)**.

In addition, the Court notes that **insofar as** Plaintiffs seek a refund of federal income tax wrongfully collected, the Court's jurisdiction is further limited by 26 U.S.C. § 7422(a), which provides:


No suit or proceeding shall be **maintained in** any court for the recovery of any internal revenue tax alleged to have been **erroneously** or illegally assessed or collected, or of any penalty claimed to have been **collected** without authority, or of any sum alleged to have been excessive or in any **manner wrongfully** collected, until a claim for refund or credit has been duly filed with the **Secretary**, according to the provisions of law in that regard, and the regulations of the **Secretary** established in pursuance thereof.

There is no evidence whatsoever in the **record to suggest** that the Plaintiffs have filed a proper claim for refund with the Secretary. Thus, the **Court does not** have jurisdiction over Plaintiffs' claim for tax refund.

For the reasons set forth above, **Defendants'** Motion to Substitute the United States as the Sole and Proper Defendant (Docket #2) **is hereby** granted and Defendants' Motion to Dismiss (Docket #6) is hereby granted.

IT IS SO ORDERED.

This 3<sup>rd</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HYPERVISION, INC.,

Plaintiff,

vs.

Case No. 94-C 737K

DAVID NOSS and MYRIAD  
TECHNOLOGIES, INC.,

Defendants

MYRIAD TECHNOLOGIES, INC.

Third Party Plaintiff,

v.

JERRY BULLARD AND JIM NOEL,

Third Party Defendants.

ENTERED ON DOCKET

APR 03 1996

**FILED**

APR 02 1996

**ORDER OF DISMISSAL**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Myriad Technologies, Inc. Application to Dismiss with Prejudice Damages Claim Against Jim Noel being now before the Court, it is hereby ordered that:

Myriad's claim for damages against Noel is dismissed with prejudice under Fed. R. Civ. P. 41.

Noel remains subject to this Court's Order of November 1, 1994 enjoining further acts of patent infringement or misappropriation of trade secrets.

This dismissal with prejudice closes the damages portion of this lawsuit and moots the currently scheduled trial on damages.

**/s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

RUSTY MORGAN aka ROY RUSSELL  
MORGAN; LISA K. MORGAN aka LISA  
KAYE MORGAN; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

ENTERED ON DOCKET  
DATE APR 1 1996

Civil Case **FILED** 96-0696 D

APR 02 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 1 day of April, 1996.

**/s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:  
STEPHEN C. LEWIS  
United States Attorney

  
**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463  
LFR:lg

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA**

FREDERICK DEMON LAFAYETTE,

Petitioner,

v.

OKLAHOMA DEPARTMENT OF  
CORRECTIONS,

Respondent.

**FILED**

APR - 2 1996

No. 95-C-309-K Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 03 1996

**REPORT AND RECOMMENDATION**

Petitioner, Frederick Demon Lafayette, filed a petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on April 3, 1995. Petitioner, currently confined by the Oklahoma Department of Corrections, challenges pro se his prior conviction in Case No. CF-93-2215. By minute order dated April 3, 1995, the District Court referred the petition for further proceedings consistent with the Magistrate Judge's jurisdiction. On September 14, 1995, Respondent filed a Motion to Dismiss. For the reasons discussed below, the United States Magistrate Judge recommends that the Motion to Dismiss be **GRANTED**.

**I. PROCEDURAL AND FACTUAL BACKGROUND**

On January 26, 1994, Petitioner was found guilty, following a jury trial, of murder in the first degree. Petitioner was sentenced to life without parole. See Exhibit "1" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

By letter dated June 30, 1994, Plaintiff wrote to Judge Hopper (the trial judge for his criminal jury trial) asking whether or not an attorney had been appointed for him (for the direct appeal of his case). The Court Clerk of Tulsa County responded that all records and notices in the appeal were being forwarded to Mr. Jack Zanerhoft, who represented Petitioner at his trial. The letter further stated that the clerk did not have the address or phone number of the attorney.<sup>17</sup> See Exhibit "2" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

On July 20, 1994, a Deputy Clerk from the Supreme Court of Oklahoma wrote Petitioner informing him that Petitioner's records indicated that he was pro se, and that if Petitioner wanted counsel appointed in his case he should make application to the district court. See Exhibit "3" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

Ms. J.M. White wrote a letter to the Oklahoma Bar Association on July 25, 1994, stating that Mr. Zanerhaft had not withdrawn from Petitioner's case, that the Oklahoma Appellate Court had advised her that Petitioner was not represented by an attorney, that the Oklahoma District Court would not appoint another attorney until Mr. Zanerhaft had withdrawn, and stating that Mr. Zanerhaft had violated Oklahoma appellate rules. See Exhibit "4" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

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<sup>17</sup> Exactly how the records were forwarded to the attorney when the Clerk did not have the attorney's address remains a mystery.

By letter dated September 22, 1994, Dan Murdock, General Counsel of the Oklahoma Bar Association wrote to Ms. White, enclosing a copy of a letter received from Mr. Zanerhaft which addressed Ms. White's complaints. See Exhibit "5" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

Mr. Zanerhaft explained that he represented Petitioner only for the purpose of the initial arraignment, the preliminary hearing, and the trial. According to Mr. Zanerhaft, he did not agree to work on the direct appeal for Petitioner unless he was first paid a retainer. (Mr. Zanerhaft noted that he was still owed fees for his work on the trial.) However, Mr. Zanerhaft stated that although he scheduled several appointments with Petitioner's mother, she did not make the appointments, and his retainer was not paid. Regardless, Mr. Zanerhaft did prepare some of the direct appeal papers, but states that he did so with the understanding he would do no further work on the case until a retainer was paid. Mr. Zanerhaft additionally explained that he instructed Petitioner's mother that she should contact the Public Defender with the Oklahoma Indigent Defense System to arrange representation for Petitioner. See Exhibit "5" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

By letter dated September 27, 1994, Ms. White wrote to Mr. Zanerhaft stating that she had talked to Judge Hopper that day, and that Judge Hopper had informed her that Mr. Zanerhaft had not yet been released from Petitioner's case. Ms. White states in her letter that Judge Hopper informed her that Mr. Zanerhaft should contact

Judge Hopper or the Judge would find him in contempt of court. See Exhibit "6" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

In September of 1994, Ms. White additionally wrote a second grievance letter to the Oklahoma Bar Association concerning Mr. Zanerhaft. Ms. White, in her letter, explained that although Mr. Zanerhaft claimed to have no further responsibility with respect to Petitioner, Judge Hopper had informed her that Mr. Zanerhaft's duties were not concluded. Ms. White wrote that she believed Mr. Zanerhaft had violated various Oklahoma rules regarding the duties of counsel. See Exhibit "7" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

By letter dated October 14, 1994, Dan Murdock of the Oklahoma Bar Association wrote Ms. White stating that the Oklahoma Bar Association was not in a position to resolve her complaint against Mr. Zanerhaft. Mr. Murdock stated that the conduct Ms. White complained of did not constitute a violation of the Oklahoma professional rules, and the Oklahoma Bar Association declined, at this time, to take action. Mr. Murdock advised Ms. White that she could consult an attorney who could advise her on her alternatives. See Exhibit "8" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

On October 26, 1994, Ms. White wrote a letter to Chief Judge Ralph B. Hodges, of the Supreme Court of Oklahoma, summarizing some of the above events. She additionally wrote that she had contacted various public defenders to attempt to arrange counsel. The Oklahoma Indigent Defense System had agreed to provide counsel, and sent a form to her which needed to be signed by Judge Hopper. Ms.

White wrote that she attempted to get Judge Hopper to sign the form but he insisted that Mr. Zanderhaft was Petitioner's attorney, and that Mr. Zanderhaft had to first resign from the case before Judge Hopper could sign the form. According to Ms. White, Mr. Zanderhaft agreed to help her with the form, and he told her that he would arrange to have Judge Hopper sign it. Ms. White stated that although Mr. Zanderhaft assured her he would withdraw, when she called the clerk's office (on October 17, 1994), the motion to withdraw had still not been filed, and Mr. Zanderhaft stopped returning her phone calls to his office. Ms. White requested some assistance in determining the "status of this matter." See Exhibit "9" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

On December 7, 1994, Lisbeth L. McCarty of the Division of the Oklahoma Indigent Defense System filed a Motion to Dismiss the Appeal for Lack of Jurisdiction. According to the Motion, Petitioner was sentenced on January 26, 1994; on February 7, 1994, Mr. Zanderhaft filed a Notice of Intent to Appeal and Designation of Record; on November 30, 1994, Judge Hopper entered an Order appointing the Oklahoma Indigent Defense System to represent Petitioner; no petition-in-error or brief-in-chief was filed. The Motion states that the appeal should be dismissed for lack of jurisdiction. "Thereafter, trial counsel can file a Motion for Re-sentencing in District Court. Mr. Lafayette can then be re-sentenced by the District Judge, and trial counsel can then file the Notice of Intent and Designation within ten days of the sentence and with all appropriate parties. If Mr. Lafayette is still indigent, the District

Judge would then be able to properly appoint the System." See Exhibit "11" to Petitioner's Writ for a Petition of Habeas Corpus, filed April 3, 1995 [Doc. No. 1-1].

By Order dated January 9, 1995, and pursuant to the Motion of the Oklahoma Indigent Defense System, the Oklahoma Court of Criminal Appeals dismissed Petitioner's direct appeal. The Court noted that the appeal had not been timely perfected. In addition, the Court stated:

If Appellant still wishes to appeal, the proper procedure is to file an application for post-conviction relief requesting an appeal out of time in the District Court. 22 O.S. 1991, § 1080-1089. Appellant's right to appeal the merits of the allegations raised is dependent upon his ability to prove he was denied an appeal through no fault of his own. See Smith v. State, 611 P.2d 276 (Okla. Ct. Crim. App. 1980). If the District Court finds merit in the motion and recommends Appellant be allowed to appeal out of time, Appellant should file a petition for an appeal out of time in this Court with a copy of the District Court's order attached to it. This Court will consider the District Court's recommendation and grant or deny an appeal out of time. If the District Court denies his request, Appellant should attach a copy of the District Court's denial to his appeal to this Court.

See Exhibit "5" to Petitioner's Supplemental Complaint, filed April 25, 1995 [Doc. No. 4-1], (Order Dismissing Appeal, filed January 9, 1995).

On April 3, 1995, Petitioner filed a Petition for a Writ of Habeas Corpus. Petitioner asserts, generally, that he was deprived of his right to appeal his state court proceeding and was denied a right to counsel.

On September 14, 1995, Respondent filed a Motion to Dismiss for Failure to Exhaust State Remedies and Brief in Support. [Doc. Nos. 6-1, 7-1]. Respondent

argues that before a federal court addresses the merits of a claim, Petitioner should establish that the exact claims were presented to the state appellate courts. Respondent requests that this Court dismiss Petitioner's action because Petitioner has not fully exhausted his state court remedies.

Petitioner requests that this Court deny the Motion to Dismiss. Petitioner asserts that he has been deprived of his direct appeal and has been denied counsel on his direct appeal. [Doc. No. 8-1].

## II. ANALYSIS

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

In this case, Petitioner's claims are that: (1) he was denied his right to a direct appeal, and (2) he was denied counsel for his direct appeal.<sup>2/</sup> However, Petitioner has never presented any of these claims in state court. Petitioner's direct appeal was dismissed after Motion by his counsel<sup>3/</sup> requesting a dismissal due to a jurisdictional defect. In the Order dismissing the action, the Oklahoma Court of Criminal Appeals informed Petitioner that if he wished to continue his direct appeal, he should file a motion for post-conviction relief in the district court requesting permission to file a

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<sup>2/</sup> The Tenth Circuit has recognized that a defendant's right to effective assistance of counsel applies at trial as well as during the ten-day period for perfecting a direct appeal. Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991); Romero v. Tansy, 46 F.3d 1024, 1030 (1995).

<sup>3/</sup> Judge Hopper appointed the Oklahoma Indigent Defense System ("OIDS") to represent Petitioner on his direct appeal. The attorney for OIDS, in her Motion requesting dismissal noted that due to the procedural status of the case OIDS had not been properly appointed. She requested that the Court of Criminal Appeals dismiss the case to permit Petitioner's trial counsel to file a motion in the district court for resentencing.

direct appeal out-of-time. Nothing in the record indicates whether Petitioner attempted to file such a motion.

Petitioner does not address the arguments asserted by Respondent that Petitioner has failed to exhaust his **state court** remedies. Petitioner asserts only that he has been denied his right to a **direct appeal** and his right to counsel, and requests that this Court deny Respondent's **Motion**.

Nothing in the record **presented** to this Court or in the briefs of the parties suggests that Petitioner has presented his arguments to the state court. In addition, in its Order dismissing the **direct appeal**, the Oklahoma Court of Criminal Appeals outlined the steps Petitioner should **take** to properly present his arguments to the state court.

The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the end of **protecting and promoting** the state's role in resolving the constitutional issues raised in **federal habeas** petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982). Under the principles of exhaustion, this Court must dismiss a petition which includes **issues which** have not been presented to the state courts.<sup>4/</sup> Because Petitioner has **not presented** the issues which he alleges in his **Petition for a Writ of Habeas Corpus** to the state courts, the Petition should be

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<sup>4/</sup> A limited exception to this rule exists. See, e.g., Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995) ("If a federal court that is faced with a **mixed petition** determines that the petitioner's unexhausted claims would now be procedurally barred in **state court**, 'there is a procedural default for purposes of federal habeas.' Therefore, instead of **dismissing the entire** petition, the court can deem the unexhausted claims procedurally barred and address the **properly exhausted** claims."). However, this exception is not applicable to this case.

dismissed without prejudice to permit Petitioner to exhaust his remedies in state court.

### III. RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **GRANT** Respondent's Motion to Dismiss without prejudice.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of the receipt of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 2 day of April 1996.

A handwritten signature in cursive script, appearing to read "Sam Joyner", written over a horizontal line.

Sam A. Joyner  
United States Magistrate Judge

FILED  
APR - 2 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HORSEHEAD INDUSTRIES, INC., d/b/a )  
ZINC CORPORATION OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ST. JOE MINERALS CORPORATION, )  
et al., )  
 )  
Defendants. )

No. 94-C-98-B

EDD 4/3/96

FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW

This action is now commenced by Plaintiffs, Horsehead Industries, Inc. ("Horsehead"), d/b/a Zinc Corporation of America ("ZCA"), St. Joe Minerals Corporation ("St. Joe"), Fluor Corporation ("Fluor"), and Salomon, Inc. ("Salomon"), pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675, and various common law theories against Cyprus Amax Minerals Company ("Cyprus"). The suit arises out of past and future response and remedial costs incurred that have and will result from zinc smelting refinery operations occurring on-site and off-site on property located in Bartlesville, Oklahoma, from 1907 to 1993. Cyprus asserts a counterclaim against Plaintiffs for some past and future response and remedial costs it has and will incur for off-site remediation.

The case was tried to the Court, sitting without a jury, on

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the dates of December 4, 5, 6, 7, 11, 14, 15, 18, 19 and 20, 1995. Following a consideration of the issues, evidence, arguments of counsel and applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52.

### FINDINGS OF FACT

#### **I. JURISDICTION, VENUE AND PROCEDURAL BACKGROUND**

1. Plaintiffs brought this action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and various common law theories of liability.

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b).

3. The suit arises out of response actions that resulted from various zinc smelter and recovery operations that occurred on property located in Bartlesville, Oklahoma (the "Bartlesville Facility"), from 1907 to 1993. Three response actions currently are underway. The first, being ordered under the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), addresses the approximately 150 acres where horizontal retort zinc smelters and an electrolytic zinc refinery physically operated (the "On-Site Area" or "Bartlesville Facility"). (See Pretrial Order ("PTO"), Stip. 1, 2 at pp. 6-7)

4. In addition, surrounding areas within Bartlesville (the "Off-Site Area") are being addressed in two separate and distinct operable units under CERCLA. Operable Unit One addresses the portions of the Off-Site Area containing soils with lead and cadmium above designated action levels considered most likely to impact human health. Operable Unit Two concerns certain ecological threats and is focused on a stream system located to the south of the Bartlesville Facility. (See 12/7 Trial Testimony of Robert H. Oliver ("Oliver Test.") at 11-16)

5. In February 1994, ZCA brought this action against St. Joe, Fluor, Salomon and Cyprus, seeking contribution for response costs incurred, and to be incurred, with respect to the On-Site Area.

6. In August 1994, ZCA entered into a settlement with St. Joe, Fluor and Salomon by which these parties, all now aligned as Plaintiffs, are jointly funding the investigation and necessary corrective measures for the On-Site Area. Cyprus has not participated in the Plaintiffs' remedial efforts regarding the On-Site Area. (See PTO, Stip. 40, 42, 43 at p. 12; Oliver 12/7 Test. at 32-34; Trial Testimony of Thomas E. Janeck ("Janeck Test.") at 45)

7. As discussed more fully below, Salomon and Cyprus have participated in certain response actions in the Off-Site Area. Cyprus has asserted counterclaims against Plaintiffs seeking contribution for response costs it has allegedly incurred for the

Off-Site Area. Plaintiff Salomon seeks a declaratory judgment against Cyprus for its equitable share of response costs to be incurred in the Off-Site Area. (PTO at 2)

8. Hazardous substances generated at the Bartlesville Facility have been detected at the Facility and at certain areas around the Facility. (PTO, Stip. 3 at 7)

9. Both the On-Site Area and the Off-Site Area are "facilities" within the meaning of CERCLA Section 101(9), 42 U.S.C. § 9601(9). Further, a "release" of "hazardous substances" within the meaning of CERCLA Sections 101(14) and 101(22) has occurred at both the On-Site Area and the Off-Site Area. (PTO, Stip. 4 at p. 7)

## II. THE PARTIES

10. Beginning in 1907, three horizontal retort smelters commenced operation at the Bartlesville Facility. One of those smelters was owned by the Bartlesville Zinc Company (the "BZC smelter") and operated from 1907 to 1924. A second smelter was owned by the Lanyon-Starr Smelting Company (the "LSSC smelter") and operated from 1907 to 1924. The properties used for these smelter operations were owned by LSSC and/or BZC until 1930. The parent corporation of BZC and LSSC was American Metals Company (Limited) ("AMCO"). (November 17, 1995, Order, at 4-12)

11. Cyprus is a Delaware corporation with its principal place

of business in Colorado. Cyprus is the surviving entity of a merger between Cyprus Minerals Company and Amax, Inc., in December 1993, and as such is the successor to Amax, Inc., which was formerly known as and is the successor company to AMCO. Cyprus has admitted that it became the corporate successor to AMCO in 1957. (Id., Plaintiffs' Ex. 284)

12. This Court previously has found that AMCO controlled the operations of the BZC and LSSC smelters from 1907 to 1924. Accordingly, the Court has held that Cyprus, as the admitted successor to AMCO, is liable as a former owner/operator under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). (Court Order Nov. 17, 1995, Doc. #185).

13. The third horizontal retort smelter that began operation at the Bartlesville Facility in 1907 was built and owned by National Zinc Company, a New York corporation ("NZNY"). NZNY was incorporated in 1907 as a subsidiary of Beer, Sondheimer & Co. of Frankfurt, Germany ("Beer Germany"). (Defendant's Exs. 846 at 1, 679 at 2; Plaintiffs' Exs. 781, 819, 830)

14. In 1915, Beer, Sondheimer & Co. ("Beer NY") was incorporated in New York. The NZNY stock held by Beer Germany then was transferred to Beer NY. (Plaintiffs' Exs. 824, 827)

15. In approximately 1920, Beer NY changed its name to International Minerals and Metals Corporation ("IM&M"), a New York corporation. (Plaintiffs' Ex. 827)

16. Also in or about 1920, National Zinc Company, Inc.,

("NZCI") was incorporated. Assets of NZNY were transferred to NZCI, whose parent company also was IM&M. IM&M continued operation of the smelter through NZCI until 1972. (Trial Testimony of Thomas Vogt ("Vogt Test.") at 6-9; Plaintiffs' Exs. 545, 783)

17. In 1972, IM&M sold the Bartlesville Facility (minus the inventory of raw materials) for \$400,000, to a group of former NZCI management personnel who incorporated in Oklahoma under the name J-V Smelting Company ("JVSC"). JVSC subsequently changed its name to National Zinc Company, Inc. ("NZ Oklahoma"). NZ Oklahoma no longer exists. (Vogt Test. at 10-13, 30, 166; Plaintiffs' Exs. 248, 535, 545)

18. Plaintiff Salomon is a Delaware corporation with its principal place of business in New York. Salomon has stipulated that, for purposes of this litigation, it would consent to be treated as the parent corporation of National Zinc Company ("NZC"), a Delaware corporation that purchased the Bartlesville Facility from NZ Oklahoma in February 1974, and operated it until NZC was sold to a third party in December 1983. See *infra*, ¶¶ 31-59.

19. NZC continued to operate the horizontal retort smelter at the Bartlesville Facility from February 1974 to July 1976, at which time the retort smelter operation ceased. Beginning in December 1976, NZC commenced operation of an electrolytic zinc refinery built with funds from Salomon at a cost of \$41.5 million. As discussed more fully below, the electrolytic zinc refinery was a

different zinc smelting process than the prior horizontal retort process. See *infra* ¶¶ 54-57.

20. Plaintiff St. Joe is a New York corporation with its principal place of business in St. Louis, Missouri. St. Joe was a former subsidiary of Plaintiff Fluor (collectively, "St. Joe"). St. Joe purchased the Bartlesville Facility in August 1984 and operated the Facility until August 1987. St. Joe has admitted that it was the owner and operator of the Bartlesville Facility during that period of time. St. Joe operated the electrolytic zinc refinery only. (PTO, Stip. 14 at p. 8)

21. Plaintiff ZCA purchased the Bartlesville Facility in August 1987 and is the current owner of the Facility. ZCA has admitted that it was the owner and operator of the Bartlesville Facility from August 1987 to date. ZCA operated the electrolytic zinc refinery only.<sup>1</sup> (PTO, Stip. 15 at p. 8)

22. The BZC and LSSC smelters were located on what is now the western portion of the Bartlesville Facility, a total of approximately 38 acres equally divided. The NZCI smelter was located in the south part of the Bartlesville Facility.

### III. CONTINUITY OF INTEREST

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<sup>1</sup>The Plaintiffs in this case, Salomon, St. Joe and ZCA, have reached a settlement among themselves concerning the percentage of past and future allocation of damages for on-site and off-site remedial costs.

23. IM&M, through various corporate names and structures, retained control of the National Zinc smelter at the Bartlesville Facility from 1907 until 1972, when the Facility was sold to JVSC. (Findings of Fact 13-16)

24. JVSC was formed by Frederick Jeffrey, president of NZCI and vice president of IM&M, and Thomas Vogt, vice president of NZCI, to purchase the NZCI site that they, as management officials, had been responsible for operating for IM&M. (Vogt Test. at 10)

25. Jeffrey and Vogt acquired financing by bringing together investors for the purchase. (Vogt Test. at 10)

26. The purchase agreement did not expressly address environmental liabilities, but it did provide generally for JVSC to assume NZCI's liabilities (with certain non-environmental exceptions). (Vogt Test. at 15; Plaintiffs' Ex. 248 (§ 2.1(b) and Ex. C))

27. Bartlesville, Oklahoma, residents owned 65 percent of NZ Oklahoma, while Jeffrey and Kerramerican, Inc., a Canadian corporation, owned the remainder. There is no evidence that the NZ Oklahoma stockholders also owned stock in IM&M. (Vogt Test. at 11-12; Plaintiff's Exs. 244, 245)

28. Due to shortage of capital, NZ Oklahoma's horizontal retort refinery business primarily was via tolling contracts and/or sales agency agreements with raw materials suppliers, rather than purchase of raw materials, production and sales (Vogt Test. at 16-17); however, most other aspects of the business did not change:

\* Jeffrey and Vogt were managers of the National Zinc facility under both IM&M and JVSC/NZ Oklahoma. (Vogt Test. at 10) Jeffrey was chairman of the board of NZ Oklahoma and an "active executive"; Vogt became president and chief executive officer of NZ Oklahoma. (Defendant's Ex. 846, pp. 3, 5)

\* Both before and after the sale, Jeffrey was instrumental in operating and management decisions concerning the facility, usually during monthly visits to Bartlesville. (Vogt Test. at 9; Defendant's Exs. 829-845; Van Aken Test. 18-19)

\* While managing NZ Oklahoma, both Jeffrey and Vogt had office space in New York leased from IM&M. (Defendant's Ex. 629)

\* JVSC purchased the National Zinc name, and continued using the same industry-recognized logo on equipment, railroad tank cars, advertisements, billboards, stationary, the molds used to cast metal (the brand was seen on the metal), and the plant itself. Further, the logo was a registered brand on the commodity exchanges and had been used in the industry since 1907. (Vogt Test. at 30)

\* Both operating employees and operating management of the facility under IM&M/NZCI remained the same after the facility was sold to JVSC/NZ Oklahoma. (Vogt Test. at 157;

Defendant's Ex. 846 at p. 3)

\* The sale included the "entire business, its name, good will, and all plant facilities together with essentially all its assets and liabilities". (Defendant's Ex. 846 at p. 3)

\* A "Memorandum Concerning Acquisition of Assets of National Zinc Co..." written by Frederick Jeffrey and Thomas Vogt states that, after JVSC acquired the Bartlesville Facility, "[t]he Company will continue the business presently engaged in by National Zinc Company, Inc., ... in substantially the same form, except that the new company will primarily refine and process ores belonging to others, rather than on its own account". (Defendant's Ex. 626 at 1)

\* The Memorandum further stated that JVSC was organized "for the purpose of acquiring and carrying on the zinc smelting and refining business of National Zinc Company, Inc., ...". (Defendant's Ex. 626 at 2)

29. To address air emissions concerns, NZ Oklahoma increased the height of the stacks on the sulfuric acid plant and the sinter plant in order to increase dissipation. (Vogt Test. at 18)

30. In February 1973, NZ Oklahoma received a one-year air emissions variance from the state of Oklahoma regarding the particulate and visible emission regulations for operation of the retort smelter. (Vogt Test. at 23; Plaintiff's Ex. 87)

31. On or about February 11, 1974, NZ Oklahoma sold the Bartlesville Facility to Iskane, Inc., (a subsidiary created by Salomon, Inc., to purchase the facility) for \$4 million and a promise to replace the retort smelters with an electrolytic zinc processing refinery. (Rothschild Test. at 11; Vogt Test. at 26)

32. Iskane, Inc., changed its name to National Zinc Company ("NZC").

33. Salomon admits liability for the actions of NZC. (Opening Statements at 25)

34. As a condition of the purchase, NZ Oklahoma obtained a one-year continuation of its air emissions variance from the state of Oklahoma. (Plaintiffs' Ex. 155) This variance allowed NZC to operate the retort smelter while constructing the electrolytic plant that eventually would replace the smelter, about two and a half years later. (Vogt Test. at 22-24, 47-48; Plaintiffs' Exs. 155, 158)

35. Salomon/NZC assumed millions of dollars of specified liabilities, including accounts payable, taxes payable, accrued payroll and employee benefits. (Plaintiffs' Ex. 155) Salomon, however, expressly attempted to avoid assuming environmental liabilities. Salomon's Letter of Intent stated that:

[NZ Oklahoma] will sell and convey all of its assets, properties, business and good will, including the use of its name and open contracts ... excluding, however, in each case any liabilities for pollution matters....

Rather, the Letter provided that Salomon would:

indemnify the [NZ Oklahoma] shareholders against distributee liability, if any, for pollution matters, in excess of the amount of escrow for such matters....

(Defendant's Ex. 100) Also, the Acquisition Agreement excluded:

liabilities or obligations, contingent or otherwise ... arising out of or relating or attributable to any damage to persons or property on account of discharges prior to the Closing Date into the air or water or on the land by any plant or plants now or heretofore located on premises presently occupied by [NZ Oklahoma], or any laws or regulations governing pollution matters (all such debts, liabilities and obligations being hereinafter referred to as "Pollution Liabilities")....

(Defendant's Ex. 92)

36. Salomon/NZC agreed with NZ Oklahoma to keep intact substantially all of NZ Oklahoma's organization, officers, employees, goodwill and customer base. (Defendant's Ex. 92, § 1.03)

37. Salomon/NZC retained most of the operational employees at the Bartlesville Facility, as well as existing management. (Vogt Test. at 167-69; Knobler Dep. at 62; Defendant's Exs. 92, 106, 117, 238, 425, 643)<sup>2</sup>

38. Thomas Vogt, who served as vice president of NZCI when NZCI owned the site, and who served as president of NZ Oklahoma when NZ Oklahoma owned the site, was one of two non-Salomon members

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<sup>2</sup>Plaintiffs' contention that such personnel had to be retrained when the facility switched to the electrolytic process is irrelevant to the issue of whether NZ Oklahoma employees were retained by Salomon/NZC.

of NZC's board of directors. (Vogt Test. at 41)

39. Vogt continued to make decisions regarding day-to-day operations of the Bartlesville Facility. (Vogt Test. at 176; Defendant's Ex. 129)

40. Frederick Jeffery, who served as president of NZCI and vice president of IM&M when IM&M/NZCI owned the site, and who served as chairman of the board of NZ Oklahoma when NZ Oklahoma owned the site, was the second of two non-Salomon members of NZC's board of directors. (Vogt Test. at 41)

41. For two and a half years, Salomon/NZC continued to use the same production facilities as did previous owners of the site: the horizontal retort smelter, the acid plant, the sintering plant and all other auxiliary operations. (Vogt Test. at 159-60; Defendant's Ex. 685)

42. After Salomon/NZC converted to the electrolytic process, it used some of the older buildings as maintenance shops and storage areas. (Vogt Test. at 103)

43. The facility continued to produce zinc after Salomon/NZC's acquisition and continued to serve the same customers as before the acquisition.<sup>3</sup> (Vogt Test. at 103-04)

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<sup>3</sup>The retort smelter produced Prime Western zinc, which is about 98.5 percent zinc and 1.5 percent lead. Two years later, after startup of the electrolytic facility, the site produced "high-grade" zinc, which is about 99.95 percent zinc, that could be sold to new customers. (Knobler Dep. at 201-03) However, to retain the former customer base, Salomon/NZC continued to produce Prime Western zinc with the electrolytic facility by adding lead or aluminum to the high-grade zinc. (Vogt Test. at 180-84)

44. The Bartlesville Facility continued as a custom smelter after Salomon/NZC's acquisition, and it continued to produce zinc, cadmium and sulfuric acid from zinc concentrates and secondaries. (Knobler Dep. at 93-4; Vogt Test. at 103-04, 167; Defendant's Exs. 447, 695, 1331)

45. Salomon/NZC bought the name, assets, business, goodwill, contracts and accounts receivable from NZ Oklahoma. (Vogt Test. at 165; Defendant's Exs. 92, 105, 1372)

46. Salomon/NZC used the name "National Zinc Company" because it was a name that was recognized in the industry. (Vogt Test. at 30; Defendant's Exs. 105)

47. Salomon/NZC's logo was essentially the same as that used by NZ Oklahoma; the company name at the top of the letterhead was in the same type size and style, but removed "inc." from the name and removed the zip code. (Defendant's Exs. 769, 752)

48. Salomon/NZC continued to sell zinc slab made in molds that imprinted the National Zinc logo. (Vogt Test. at 171, 173)

49. Salomon/NZC held itself out to the general public as a continuation of the National Zinc enterprise that had operated at the Bartlesville Facility since 1907. (Vogt Test. at 186-88; Defendant's Exs. 1369, 1375)

50. Salomon/NZC ran the retort smelter for two and a half years. During this time, the operation used some more advanced equipment to help reduce emissions and wastes from the horizontal retort process. (Zunkel Test. at 30-36, 58; Vogt Test. at 48;

Marlatt Test. at 22-23; Plaintiffs' Exs. 98, 402, p. 12)

51. Also during this time, NZC continued to maintain and improve the surface water impoundment and pumpback system, thereby somewhat reducing releases of lead and cadmium into the Off-Site Area by containing any such pollution on-site. (Vogt Test. 54-58)

52. Further, Salomon/NZC also financed construction of an electrostatic precipitator on the sinter plant to provide interim controls on particulate emissions. This precipitator was installed in 1974. (Vogt Test. 23-25, 47-50; Plaintiffs' Exs. 90, 102)

53. While operating the retort smelter, which was shut down on July 31, 1976, NZC received numerous extensions of its air emissions variance (originally obtained by NZ Oklahoma) from the state of Oklahoma. All such variances were submitted to the EPA, and the EPA never approved or disapproved them. (Vogt Test. at 6, 42, 48)

\* First extension: until February 20, 1975. This variance was submitted to the EPA in March 1974, and the EPA never approved or disapproved it. (Vogt Test. at 47-48; Plaintiffs' Exs. 91, 155, 265);

\* Second extension: until February 20, 1976. This variance extended the shutdown date for the retort furnaces from May 31, 1975, until May 31, 1976; provided for shutdown of the sinter plant on August 31, 1976; and for startup of the electrolytic refinery on May 31, 1976. This extension also was submitted to the EPA and was never approved or

disapproved. (Plaintiffs' Ex. 94, 98)

\* Third extension: until July 31, 1976 for shutdown of the smelter and completion of the electrolytic refinery. This was submitted to the EPA on June 4, 1976, and was never approved or disapproved. (Plaintiffs' Ex. 98)

54. The electrolytic zinc refinery process is fundamentally different than the horizontal retort process. The retort process is pyrometallurgical in nature, using high temperature operations to process zinc-bearing raw materials. The electrolytic process is a chemical process based on hydrometallurgy and electrometallurgy, i.e., leaching solids and plating zinc with electric current in solution. (PTO, Stip. 63 at p. 16)

55. The electrolytic refinery was constructed at a cost in excess of \$40 million, more than \$23 million above the original estimate. (Knobler Dep. at 188; Rothschild Test. at 9, 11; Plaintiff's Exs. 105, 170)

56. Construction of the refinery was funded by loans from Salomon to NZC. These loans subsequently were converted into capital contributions. (Rothschild Test. at 11-14; Plaintiff's Ex. 1196)

57. Salomon/NZC undertook a sizeable expenditure to clean up the operation by replacing the retort process with the electrolytic process. The principal motivation of Salomon, however, after acquiring the zinc smelting refinery at a "bargain-basement price"

in 1974, was long-term legitimate profit, not altruism. (Defendant's Ex. 452; see also Defendant's Exs. 422, 425, 447)

58. Effective May 22, 1974, the EPA conditionally approved a variance for Salomon/NZC with an expiration date of February 20, 1974, and a "final compliance date" of July 1, 1974, for the sintering process, and May 31, 1975, for the retort furnace smelting process. (39 Fed. Reg. at 17,982)

59. On or about December 30, 1983, the Salomon subsidiary then holding the capital stock of NZC sold that stock to Lee Consulting Group pursuant to a Stock Purchase Agreement. (Plaintiffs' Ex. 285) The president of Lee Consulting Group was a former Salomon executive and director of Salomon's National Zinc subsidiary. (Defendant's Ex. 1082)

#### IV. SOURCES OF CONTAMINATION

##### A. The BZC and LSSC Smelters

60. The BZC, LSSC and NZCI smelters were horizontal retort smelters. Horizontal retort smelting is a pyrometallurgical process, meaning that it is a burning process that, in the case of the BZC, LSSC and NZCI smelters, used natural gas to fuel the process. Because horizontal retorting is a pyrometallurgical process, the process generates significant quantities of air emissions. (Trial Testimony of Dr. Alan D. Zunkel ("Zunkel Test.") at 6-7; Plaintiffs' Ex. 402)

61. Ore concentrates received at the plant were first roasted in roasters; the roasted material was then, together with coal and certain other materials, heated in a sinter plant to agglomerate the roasted ore into a porous aggregate; the sinter from the sinter plant was then fed to retort furnaces where the zinc was vaporized, collected in condensers, and thereafter made into final products. (PTO Stip. No. 53 and Plaintiffs' Demonstrative Ex. D)

62. The primary source points for air emissions from the type of horizontal retort process operated at the BZC, LSSC and NZCI smelters were the roasters, the retort furnaces and in the case of BZC and LSSC clinkering. If not captured or contained, significant quantities of lead and cadmium were released into the environment from the horizontal retort process through air emissions. (Zunkel Test. at 7-8)

63. In addition, the horizontal retort process generates a residue that contains lead and cadmium from the burning of zinc concentrates in the retort furnaces. In the period of the operation of the horizontal retort smelters ("BZC" and "LSSC" (1907-1924) and NZCI and successors (1907-1976)), it was the practice of smelter operators to collect this residue in the basement of the retort furnaces, remove it from the furnaces and dispose of the residue on the surface of the ground. The chemical composition and amount of retort residue was a function of the efficiency of the horizontal retort smelter process. The less efficient the operation, the more lead and cadmium was left in the

residue. (Zunkel Test. at 12-14; Bodenhamer Test. at 84-85; Plaintiffs' Exs. 186, 404)

64. The volume of zinc smelting (including emissions and residues) in the horizontal retort smelters is generally measured in retort years as follows:<sup>4</sup>

BZC-LSSC (1907-1924) 139,968 retort years: 30%

NZCI (or NZC) (1907-1976) 327,424 retort years: 70%<sup>5</sup>

These percentages derive from the following number of retorts operated by each smelter. (Defendant's Ex. 1876; Defendant's Ex.

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<sup>4</sup>Plaintiffs, in their Response to Defendant's Supplemental Proposed Findings of Fact and Conclusions of Law, state: "Here, the same hazardous substances are being addressed, and each party engaged is in the recovery of zinc. Thus, the time of use and volume of production--i.e., "retort years"--provides an appropriate place in which to initiate an equitable allocation approach." (Response Brief, p. 70)

<sup>5</sup>The Court herein is required to make an equitable allocation of the past and future on-site and off-site remedial costs. Thus, the principal dispute centers in who should bear the costs from 1907-1972 for contamination caused by the orphan, NZCI. Clearly, Cyprus Amax, successor of BZC and LSSC by way of a predecessor's merger with its owner parent, AMCO, in 1958, should bear the remediation cost for the on-site and off-site contamination caused by BZC and LSSC from 1907 to 1924. (Court Order Nov. 17, 1995, Doc. #185). (Plaintiffs' contention that Cyprus should be responsible as an "arranger" from 1951 to 1957 is not supported by the record). As between Cyprus and Plaintiffs (Salomon, St. Joe and ZCA), the Court concludes that Plaintiffs, on a theory of substantial continuity of interest, should bear the remedial costs of the orphan share, plus its own operations from 1974 to 1993, when the Facility ceased operation. The Court is not pleased with this equitable result, but under the circumstances of CERCLA's strict liability and the parties before the Court, it is as equitable a result as can and should be achieved.

1877; Defendant's Ex. 1882; and Paulsen Test. at 6)

BZC: 3,456 to 5,184 retorts from 1907-24;

LSSC: 2,880 to 3,456 retorts from 1907-24; and

NZCI/NZC: 4,864 retorts from 1907-76.

(Rosasco Test. 44-46; Plaintiffs' Exs. 402, pp. 8, 10, 11; 313)

65. In allocating costs as set forth hereafter, the 70%-30% allocation between Plaintiffs and Cyprus, respectively, can be further supported by the following rationale:

- (A) Natural attenuation of older emissions;
- (B) Gradual emissions improvements over the seventy years of the NZCI and NZC operations;
- (C) Most of the vehicle transfer of residues from on-site to off-site were caused or permitted by NZCI after 1924;
- (D) NZCI and Plaintiffs operated generally over the entire 150-acre Bartlesville Facility after BZC and LSSC ceased operation in 1924; and
- (E) From about 1930 until Plaintiffs' ownership and occupation of the site, NZCI moved demolition debris and retort residues from BZC's and LSSC's western portion of the site to the central portion.

66. The lead, cadmium and sulphur dioxide from the BZC, LSSC and NZCI/NZC smelters were disbursed and deposited throughout the soils and surface water at the Bartlesville Facility as a result of both air and ground deposition. The horizontal retort smelter

roasters had uncontrolled emissions of sulfur dioxide which, when combined with moisture, creates sulfurous acid, which, when it comes in contact with lead and cadmium in soils, the metals are mobilized and can move more freely through the soils and surface water. In 1928, NZCI incorporated some improvements in the sulfur dioxide emissions. However, sulfur dioxide emissions continued throughout the operations of the zinc smelters. (Zunkel Test. at 16; Runnells Test. at 44-45; Marlatt Test. at 10, 12, 16, 21; Rosasco Test. at 163-64; Paulsen Test. at 21-22; Lee Test. at 67-68; Bodenhamer Test. at 70-73; Plaintiffs' Ex. 186; Defendant's Exs. 1622-23)

67. The BZC, LSSC and NZCI smelters did not utilize any system to contain, treat or control surface water runoff until 1970. As a result, surface water transported lead and cadmium generated from the BZC, LSSC and NZCI smelter operations throughout the Bartlesville Facility property, and contaminated surface water was permitted to be discharged in an uncontrolled manner off the Bartlesville Facility property. (Runnells Test. at 10-12, 47; Rosasco Test. at 164; Plaintiffs' Exs. 386, 504, 505; Lawmaster Test. 114-23; Defendant's Ex. 1849)

68. The BZC, LSSC and NZCI/NZC smelters contributed to the lead and cadmium located throughout the soils, surface water and groundwater both on-site and off-site at the Bartlesville Facility that is being addressed by the ongoing response actions. As recently as 1988, ZCA learned that it was capturing less than 10%

of the cadmium in its emissions rather than the 90% asserted in the equipment specifications. (Defendant's Ex. 597)

69. About every ten years from 1928 to 1973, NZCI made various improvements in the zinc smelting process intended to reduce lead, cadmium and sulfur dioxide emissions and residues. (Paulsen Test. 13, 24-26; Van Aken Test. 20-23, 45-48; Zunkel Test. 45-48; Vogt Test. 5-6, 54-55, 58, 62-63, 78-80; Marlatt Test. 22-23; Bodenhamer Test. 70-73, 77-78; Rosasco Test. 11-12, 169; Knapp Jr. Test. 4-6; Plaintiffs' Exs. 443, 490; and Defendant's Exs. 540, 597, 1054, 1622-23)

70. In 1972, environmental regulators required NZCI to construct a water impoundment and pumpback system in an attempt to contain and treat surface water containing lead, cadmium and sulfur dioxide, from past and present smelting operations, prior to it being discharged from the Bartlesville Facility. This system would reduce off-site runoff contamination but could increase on-site contamination. (Vogt Test. 54-55, 58, 129; Rosasco Test. 11-12; Knapp Jr. Test. 4-6, 11-12; Bodenhamer Test. 77-78; Plaintiffs' Exs. 133, 134, 209, 271, 386; Defendant's Ex. 54)

71. In July 1991, the Bartlesville Facility became subject to regulation under RCRA because ZCA was actively managing hazardous wastes at the Facility. ZCA was required to obtain a permit from EPA in order to continue to manage the wastes in what the EPA refers to as "solid waste management units" or "SWMUs." "SWMUs are defined as any discernable waste management unit at a RCRA facility

from which hazardous constituents might migrate. The definition does not include accidental spills from production areas..." (Deft. Ex. 36 at 213). ZCA sought a permit for 15 SWMUs at the Bartlesville Facility. (Lawmaster Test. 5-6, 10-11; Janeck Test. 36-37 and Defendant's Exs. 33, 36, 63-65)

72. The EPA identified an additional 22 SWMUs; the EPA ultimately identified a total of 37 SWMUs which constituted areas at the Bartlesville Facility that needed to be investigated by ZCA because of the potential that these areas contained elevated levels of lead and cadmium. EPA concluded that there were SWMUs, evidencing the fact that different operations had existed at the same physical location, and each had contributed lead and cadmium at the facility. ZCA was required to investigate the 37 SWMUs to determine if they contained elevated levels of lead and cadmium that would have to be addressed and submit a closure plan for each SWMU. The investigation and potential remediation involved the soils, surface water and groundwater at the Bartlesville Facility. The SWMUs involved contamination as a result of the various zinc smelting operations from 1907 until the early 1990s. (Lawmaster Test. 7, 11-12, 15; Janeck Test. 38-39; Bodenhamer Test. 97-98, 100-03; and Defendant's Exs. 36 and 74)

73. ZCA retained a consulting firm, Roberts, Schornick and Associates ("RSA"), to assist it in the investigation and potential remediation of the SWMUs identified by the EPA. RSA, on behalf of ZCA, commenced various studies that culminated in various reports

to the EPA and to the Oklahoma Department of Environmental Quality ("ODEQ"). The investigation and reporting performed by RSA from 1991 through September 1993 concerned ZCA's current operations, including designing closure plans for the goethite and nickel/cobalt piles, negotiating with Salomon and St. Joe in Plaintiff's indemnity dispute, and studying the nature and extent of the lead and cadmium present in the soils, surface water and groundwater at the Bartlesville Facility, as well as other matters. (Lawmaster Test. 15-16, 125-32, 134-35, 137-38, 146-54, 153-54; Janeck Test. 39-40, Plaintiffs' Exs. 70, 112, 130, 139, 142, 143, 144-45, 146, 150, 204-05, 231, 480-81, 487; Defendant's Demonstrative Exs. C and D)

74. In September 1993, while ZCA was still operating the electrolytic zinc refinery, ZCA entered into an administrative order on consent docket No. U.S. VI-006(h)93-H ("AOC") with the EPA pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h). The hazardous substances of concern to EPA that were to be addressed by ZCA through the AOC and its investigation and suggested corrective action were the lead and cadmium present in the soils, surface water and the groundwater throughout the Bartlesville Facility. The EPA made a specific finding that the lead and cadmium present at the Bartlesville Facility was the result of 80 years of historic operations commencing in 1907. (Janeck Test. 39; Lawmaster Test. 15-16; Bodenhamer Test. 82; Defendant's Ex. 43; Plaintiffs' Ex. 68)

75. In September 1993, subsequent to the issuance of the AOC, ZCA ceased the operation of the electrolytic zinc refinery and operations of the zinc refinery have not been resumed. (Janeck Test. 40-41; Lawmaster Test. 29-30; Wagoner Test. 56-57, 62).

76. In July 1995, ZCA was issued a Part B permit under RCRA which superseded the AOC. In addition, the ODEQ assumed responsibility from EPA for the Bartlesville Facility remediation. Under the Part B permit, ZCA was required to continue its investigation and potential remediation of the lead and cadmium present in the soils, surface water and groundwater at the Bartlesville site. The focus of the permit now is on closure of the Facility. (Lawmaster Test. 22-23; Rosasco Test. 158-59; Wagoner Test. 57-58; Plaintiffs' Ex. 449)

77. The source of the lead and cadmium in the soils, surface water and groundwater in many instances cannot be identified or "fingerprinted" to any particular company's operations at the Bartlesville Facility. However, the probable source of some of the lead and cadmium found at a particular location or at a particular SWMU at the Bartlesville facility might reasonably be inferred from the operations conducted at that location or SWMU. Each of the parties' operations from 1907 through 1993 contributed to the lead and cadmium that are still present in the media at the facility, are the subject of investigation and will be addressed through remediation, if it is ultimately determined levels requiring remediation are present. (Lawmaster Test. 15-16; Knapp Test. 149;

Runnels Test. 4-9, 19-20, 27; Paulsen Test. 7-8, 14, 28, 29; Lee Test. 68; Bodenhamer Test. 16-17, 81-82, 104-105; Plaintiffs' Ex. 384; Defendant's Ex. 74)

78. In addition, lead and cadmium are present in retort residues that were deposited at the facility property since the horizontal retort smelters operated from 1907 to 1976. It is not yet known if lead and cadmium levels exist from the retort residues at levels requiring remediation. (Lawmaster Test. 33-39, 203-210, 230; Knapp Test. 149; Paulsen Test. 15-16; Bodenhamer Test. 19, 87, 95; Plaintiffs' Exs. 488 (Table 3-13), 504, 505; Defendant's Exs. 1856, 1878, 1879)

79. There probably will not be a "single comprehensive remedy" for the Bartlesville Facility because, according to the corrective measures study currently underway, different media at the sight may require different remedies. A capping remedy on part of the site may be required, the cost of which would be driven by the aerial extent of the cap. (Lawmaster Test. 43-44; Oliver Test. 58-59; Rosasco Test. 59-61; Wagoner Test. 55-56; Plaintiffs' Ex. 488, pp. 1-3, section 1.2)

80. In 1992, following initiation of certain emergency soil removal in the Off-Site Area, the EPA proposed the Off-Site Area for inclusion on the CERCLA National Priorities List based on perceived need to address lead and cadmium in the soils. (Oliver 12-7 Test. at 7-9; Plaintiffs' Exs. 83 and 111 (HRS documentation record) at 24)

81. The EPA determined to defer any listing of the Off-Site Area on the NPL based on the commitment of the ODEQ to assume oversight responsibility for the selection and performance of necessary response actions. The EPA delegated authority to ODEQ for this purpose pursuant to a state delegation pilot project. (Oliver 12/7 Test. at 9)

82. On February 2, 1994, EPA issued a Unilateral Administrative Order (UAO) pursuant to CERCLA directing Salomon, Cyprus and Kerramerican, Inc., to continue the emergency soil removal work previously conducted by the EPA in the Off-Site Area Unit 1. Cyprus and Salomon agreed to participate in the performance of the UAO. Kerramerican declined to participate. The UAO was not issued to ZCA, but ZCA already was under the on-site RCRA AOC with EPA. (Oliver Test. 5-7; Lee Test. 16-17, 54-56; Zaneck Test. 138-39; Plaintiffs' Ex. 65; Defendant's Ex. 43 (AOC))

83. ODEQ, with concurrence of the EPA, determined to divide the Off-Site Area into two operable units for study and remediation: Operable Unit 1 to address perceived risks to human health from soil contamination, and Operable Unit 2 to address perceived risks to ecological receptors, including surface water runoff and groundwater seepage. (Oliver 12/7 Test. at 11)

84. In April 1994, Cyprus and Salomon entered into a Consent Agreement and Final Order (CAFO) with ODEQ to perform the remedial investigation, feasibility study and remedial design for remedies

selected to address concern in the two operable units in the Off-Site Area. (Oliver 12/7 Test. at 9-10; Plaintiffs' Ex. 66)

85. In February 1994, Cyprus and Salomon entered into an agreement to share equally the costs incurred by each of them to perform the UAO and the CAFO, and further agreed that this division of costs for these items would be final as between them, with no right of future reallocation or adjustment. (Oliver 12/7 Test. at 17; Plaintiffs' Ex. 1340)

86. By August 1995, Cyprus and Salomon each had expended approximately \$5.6 million to implement the UAO and the CAFO. Because Cyprus implemented the August 1995 remedial action CAFO with ODEQ, with which Salomon declined to proceed, Cyprus spent an additional approximately \$700,000.00 through October 1995, making a total of approximately \$6.3 million expended by Cyprus on the CAFO. (Oliver 12/7 Test. 29-30; Lee Test. 36-37, 63; Plaintiffs' Ex. 1343; Defendant's Ex. 1360)

87. In December 1994, ODEQ selected a remedy for Operable Unit One in the Off-Site Area intended to address the portions of this area likely to impact human health. The remedy involves remediation of soil containing lead and cadmium in excess of specified action levels. (Plaintiffs' Ex. 82)

88. In selecting the remedy for Operable Unit One, the ODEQ found:

In approximately 1907, three horizontal retort zinc smelters commenced operation at this location. Two of the smelters appear to have ceased operation in

the 1920s. In 1976, the remaining horizontal retort smelter was converted to a electrolytic zinc refinery, which is not currently operative. During the time the horizontal retorts were in operation, metals contained in the airborne emissions from the smelter [sic] were deposited over much of the area of Bartlesville that lies west of the Caney River ... Airborne emissions from historical smelting operations and associated activities appear to be the predominant mechanism of dispersal of the contaminants across the Site....

(Plaintiffs' Ex. 82, pp. 1, 4)

89. Scott Thompson, the ODEQ's Project Manager for the Off-Site Area, stated:

Based on investigations and sampling conducted by the U.S.E.P.A., ODEQ and other parties concerning the area surrounding the Bartlesville Facility, ODEQ has determined that the soil contamination (which requires the remediation being conducted under Operable Unit One) is not attributable to operation of the electrolytic refinery and related activities at the Bartlesville Facility from 1977 to 1993. ODEQ and EPA have considered the source of heavy metals in soils which is the subject of the Operable Unit One remediation to be emissions and solid wastes from smelter operations at the Bartlesville Facility from 1907-1976.

(Plaintiffs' Ex. 1214)

The ODEQ also found:

In addition, spillage and wind transport of ore concentrates from rail cars may have also contributed to elevated metals at the Site. It is also likely that solid waste materials from the smelters were physically moved to areas within the Site boundaries for uses [sic] as fill or for other purposes.

(Plaintiffs' Ex. 82 at 4)

90. The goethite piles generated by the electrolytic refinery commencing in 1977 located in the northwest section of the

Bartlesville Facility have contributed some to the air emissions and groundwater contamination on-site and off-site, but certainly to a lesser extent and degree than the horizontal retort smelters. (Defendant's Ex. 40; Bodenhamer Test. 9, 65-66) The lead and cadmium emissions from the electrolytic refinery operations were indivisible from that of the lead and cadmium emissions of the earlier horizontal retort smelters.

91. The primary source of contaminants from the Bartlesville Facility to Operable Unit 1 is from air emissions and solid waste vehicular transport of materials from the facility for use in driveways, as road bed or as fill. The lead and cadmium in the soils cannot be attributed to any particular company's operation at the Bartlesville Facility. (Lee Test. at 34-36, 41, 62; Vogt Test. at 66, 90-92; Van Aken Test. at 32-33; Zunkel Test. at 21-24)

92. The Court does not conclude that operation of horizontal retort smelters conducted in Collinsville, Oklahoma, from 1911 to 1918, and at Blackwell, Oklahoma, from 1921 to 1974, has any particular relevance by way of analysis or comparison to the on-site or off-site conditions at the Bartlesville Facility.

93. The Operable Unit 2 remedy has not been selected. It will address portions of the Off-Site Area that may pose undue risks to environmental receptors, including surface water runoff, and is focused on streams and a drainage basin to the south of the Bartlesville Facility. (Oliver 12/7 Test. at 11-14; Plaintiffs'

Ex. 485)

94. Operable Unit 2 has more direct affinity with the historical drainage area for the National Zinc smelter operations but it also was impacted by lead and cadmium generated by more than 80 years of zinc smelting and refining. (Oliver 12/7 Test. at 11-12, 27-28, 71; Oliver Test. 12/11 at 16-18, 30; Oliver Test. 12/14 at 87; Van Aken Test. at 8-9; Runnells Test. 4-8, 10-12, 16-17; Rosasco Test. 50-52, 164; Paulsen Test. 6-7, 22-23; Lee Test. 67-68; Vogt Test. at 55; Defendant's Exs. 1428, 1880)

95. Plaintiffs excluded from costs they seek under CERCLA those costs that relate solely to the operation of the electrolytic zinc refinery. In addition, Plaintiffs are not seeking from Cyprus the costs associated with the maintenance of the goethite, nickel/cobalt and Cherryvale piles in the northwest portion of the Facility that were generated by the electrolytic refinery, such as the cost of spraying the piles with a dust suppressant. Plaintiffs also are not seeking future costs that will be incurred to regrade or remove those materials piles. (Janeck Test. at 45-46; Oliver 12/7 Test. at 34; Knapp Test. at 34; Rosasco Test. at 8)

96. Cyprus agrees that "RCRA and AOC Activities" are properly response costs under CERCLA. (Cyprus' Response to Plaintiffs' Supplemental Proposed Findings of Fact and Conclusions of Law, p. 65 at 197)

97. Regarding the costs incurred for stormwater collection and treatment, the Court finds that 50 percent of these costs are

response costs under CERCLA, and 50 percent are operational and therefore not recoverable under CERCLA. Therefore, Plaintiffs are entitled to pre-judgment interest under the 70%-30% allocation on 50 percent of the requested \$11,728,100, (50% equals \$5,864,050.)<sup>6</sup> Allocation of the response costs are subject to the 70%-30% split as outlined below.

98. As previously stated, the Court concludes an equitable allocation of on-site and off-site (Operable Units 1 and 2) remedial costs, past and future, is 70% to Plaintiffs (Salomon, St. Joe, ZCA) and 30% to Defendant, Cyprus. Excepting therefrom only the \$5.6 million off-site (Operable Unit 1) costs expended by agreement of Salomon and Cyprus (total \$11.2 million) as of August 1995; and 50% of the surface water collection and treatment costs of \$11,728,100.00, which the Court concludes was 50% normal operations of the zinc smelting refinery and 50% remedial under CERCLA. In other words, Cyprus recoups none of its \$5.6 million from Plaintiffs (Salomon, St. Joe or ZCA) regarding off-site Operable Unit 1, under the 70%-30% allocation, and Plaintiffs recoup 50% of the \$11,728,100.00 for surface water collection and treatment, i.e., \$5,864,050.00 under the 70%-30% allocation.

99. Specifically, the 70%-30% split applies to the following

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<sup>6</sup>Plaintiffs, in their Response to Defendant's Supplemental Proposed Findings of Fact and Conclusions of Law, provide to the Court a table of figures that they say are correct, which includes a total of \$11,728,000 for Stormwater Processing Cost. However, the Court notes that, according to Plaintiffs' Ex. 1341, the correct figure should be \$11,728,100.

past on-site response costs expended by Plaintiff:<sup>7</sup>

<u>ACTIVITY</u>	<u>COST</u>
Stormwater Processing Cost (1980-1994 - 1/2 of total of \$11,728,100.)	\$5,864,050
Limerock	\$294,915
ZCA Administrative Costs	\$391,500
RSA Charges:	
Facility Study	\$180,669
Groundwater Monitoring	\$87,731
General/Part B/ MTR (through 1994)	\$889,582
General/Part B/ MTR (1995)	\$153,055
RCRA/AOC (through 1994)	\$519,882
RCRA/AOC (1995)	\$317,987
Pre-AOC	\$268,400
Management Comm. (1995 Costs)	\$1,166,583

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<sup>7</sup>This calculation differs from Plaintiffs' Demonstrative Exhibit "E" at trial because Plaintiffs admitted they made an addition error in their arithmetic. Plaintiffs state that their calculations in their Response to Defendant's Supplemental Proposed Findings of Fact and Conclusions of Law are correct (however, see Footnote 6, *supra*). Plaintiffs seem to have trouble with arithmetic, as is reflected in their Footnote 5, page 7 of their Response, wherein they state that the years from 1931 to 1950 and 1958 to 1974 (35 years) total 27 years, which is obviously incorrect.

SUBTOTAL	\$10,134,354
Prejudgment interest on 30% thereof	?
<u>TOTAL ON-SITE COSTS</u>	? <sup>8</sup>
<u>PLUS PREJUDGMENT INTEREST</u>	

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 9607 and 9613(f).

2. Any Finding of Fact above which might be properly characterized as a Conclusion of Law is incorporated herein.

3. The declarations of liability (the percentage allocation) set forth in the Findings of Fact above shall be binding in any subsequent action or actions to recover response costs or damages, on-site and off-site.

4. The Bartlesville Facility and the surrounding areas constitute a "facility" within the meaning of CERCLA. (Pretrial Stipulation No. 4).

5. Under CERCLA, current and former owners and operators of a "facility" are liable when there has been a release or a

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<sup>8</sup>Plaintiffs are entitled to be reimbursed 30 percent of this total, plus prejudgment interest from the date of filing this action, and Defendant Cyprus is entitled to be reimbursed 70 percent of its expenditures on Operable Unit One since August 1995, plus prejudgment interest from date of payment as calculated pursuant to the formula set out in 42 U.S.C. 9607(a)(4) (See Conclusions of Law Nos. 41-2 at p. 47).

threatened release of a hazardous substance from the facility and the release or threatened release has caused the claimant to incur response costs. 42 U.S.C. § 9607(a); FMC Corp. v. Aero Indus., 998 F.2d 842, 845 (10th Cir. 1993).

6. Responsible parties under CERCLA include (1) the current owner and operator of the facility; and (2) the owner or operator of the facility at the time hazardous substances were disposed of. 42 U.S.C. § 9607(a).

7. Hazardous substances generated at the Bartlesville Facility have been detected at certain locations at the Facility and at certain areas around the Facility. Pretrial Stipulation No. 3.

8. There is no threshold amount of a release for purposes of CERCLA liability; any amount of leaching, emitting or discharging of a hazardous substance to the environment constitutes a "release." Burlington N. R.R. v. Wood Indus. Inc., 815 F. Supp. 1384, 1391 (E.D. Wash. 1993).

9. CERCLA liability attaches only where a release or threatened release of a hazardous substance "causes the incurrence of response costs." Private party plaintiffs that seek to recover their costs must show some causal link between the release of the hazardous substance and the incurrence of response costs.

10. The statute is quite broad regarding what costs might be considered as response or remedial costs. 42 U.S.C. § 9601(24) states:

The term [remedial action] includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

Regarding "remove" or "removal", 42 U.S.C. § 9601(23)

states:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed materials, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Regarding "remedy" or "remedial action," 42 U.S.C. §

9601(24) states:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

11. CERCLA "removal" actions are short-term measures implemented "to abate a present and serious threat to public

welfare," health or the environment and should contribute to the efficient performance of any long-term remedial action. Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 711 (D. Kan. 1991); Versatile Metals, 693 F. Supp. 1563, 1577 (E.D. Pa. 1988); see also 42 U.S.C. § 9604(a)(2).

12. A "remedial action," in contrast, offers "a long-term or permanent solution to the problem." Remedial actions typically are permanent attempts to restore environmental quality by significantly reducing the volume, toxicity or mobility of the hazardous substances. 42 U.S.C. § 9621; Greene v. Product Mfg. Corp., 842 F. Supp. 1321, 1325 (D. Kan. 1993); Fairchild Semiconductor Corp. v. EPA, 769 F. Supp. 1553, 1555 (N.D. Cal. 1991), aff'd, 984 F.2d 283 (9th Cir. 1993).

13. Different National Contingency Plan ("NCP") standards apply to "removal" and "remedial" actions. The NCP requirements for "removals" are "relatively simple" in comparison to the "more detailed procedural and substantive" NCP requirements applicable to remedial actions. Amland Properties Corp. v. Alcoa, 711 F. Supp. 784, 795 (D. N.J. 1989), aff'd, 31 F.3d 1170 (3d Cir. 1994).

14. Once having established that its costs were "response costs," a "private party must prove affirmatively that its response costs were both necessary and consistent with the NCP in order to recover under CERCLA." County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1512 (10th Cir. 1991).

15. For response costs to be "necessary" under CERCLA,

plaintiffs must establish that the costs were incurred in response to a threat to public health or the environment, and in response to the NCP in effect at the time. Normal costs of operation do not qualify as "necessary" response costs under this standard. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669-70 (5th Cir. 1989); In re Bell Petroleum Servs., 3 F.3d 889, 904-06 (5th Cir. 1993); County Line, 933 F.2d at 1512; City of Philadelphia v. Stepan Chem. Co., 748 F. Supp. 283, 290 (E.D. Pa. 1990).

16. A wastewater treatment system has operated at the Bartlesville Facility since 1958. The System was upgraded in 1972 and 1980, in part to comply with more exacting standards applicable to operating zinc refineries. The system had a dual purpose of both operations and compliance with CERCLA. G. J. Leasing Co. v. Union Electric Co., 854 F. Supp. 539, 562 (S.D. Ill. 1994); and see e.g., Dedham Water Co. v. Cumberland Farms Dairy, 770 F. Supp. 41, 42-3 (D. Mass. 1991), aff'd, 972 F.2d 453 (1st Cir. 1992).

17. Of the \$11,728,100.00 expended and claimed by Plaintiffs for stormwater processing, the Court concludes one-half of same (\$5,864,050.00) is "cleanup or removal of released hazardous substances" under CERCLA, and the other half related to the ongoing operations of the zinc refinery from 1980 to 1993-94.

18. The allocation of CERCLA response costs among liable parties is "an inexact science." Accordingly, CERCLA permits courts to establish an allocation through use of "such equitable factors as the court determines are appropriate." CERCLA "does not

limit courts to any particular list of factors nor does the section direct the courts to employ any particular test." Rather, "Courts may consider any criteria relevant to determining whether there should be an apportionment, and are to resolve claims for apportionment on a case-by-case basis." One Wheeler Road Associates v. The Foxboro Company, 1995 WL 791937 at \*26, citing 42 U.S.C. § 9613(f)(1); Atlantic Richfield Co. v. American Airlines, 836 F. Supp. 763 (N.D. Okla. 1993).

19. "A district court has considerable discretion in apportioning equitable shares of response costs." FMC Corp. v. Aero Indus. Inc., 998 F.2d 842, 846 (10th Cir. 1993).

20. In allocating responsibility for commingling of contaminants, the Court may look to joint use of the site over the years in making a reasonable and rational approximation of each party's contribution. Hatco Corp. v. W.R. Grace & Co., 836 F. Supp. 1049, 1059, 1088 (D. N.J. 1993); Bell Petroleum Servs., 3 F.3d 889 at 903 (5th Cir. 1993).

21. Where no direct correlation can be drawn between the parties' activities and the contamination existing at the site, the so-called Gore Factors provide a "nonexhaustive but valuable roster of equitable apportionment considerations."<sup>9</sup> "A court may consider

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<sup>9</sup>The Gore Factors include:

- (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of hazardous waste can be distinguished;
- (2) the amount of hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste involved;

several factors, a few factors, or only one determining factor ... depending on the totality of circumstances presented to the court." Environmental Trans. Sys. Inc. v. Ensco, Inc., 969 F.2d 503, 509 (7th Cir. 1992). See also Atlantic Richfield Co. v. American Airlines, 836 F. Supp. 763 (N.D. Okla. 1993).

22. Pursuant to their acknowledged commitment, Plaintiffs are allocated full responsibility for all remediation costs associated with their goethite, nickel/cobalt and Cherryvale waste pile deposits from the electrolytic process.

23. The phrase "caused solely by" in section 107(b)(3) incorporates traditional notions of proximate or legal causation. Lincoln Properties, 823 F. Supp. at 1539-42; G.J. Leasing Co., Inc. v. Union Elec. Co., 854 F. Supp. 539, 567 (S.D. Ill. 1994) ("Under CERCLA, 'sole cause' means proximate or legal cause."), aff'd, 54 F.3d 379 (7th Cir. 1995).

24. The need for national uniformity of CERCLA liability requires that federal common law govern the imposition of successor

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(4) the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste;

(5) The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

(6) the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment.

United States v. R.W. Meyer, Inc., 932 F.2d 568, 571 (6th Cir. 1991).

liability under CERCLA. United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992); Smith Land & Improv. Corp. v. Celotex Corp., 851 F.2d 86, 91-2 (3d Cir. 1988) ("In resolving the successor liability issues here, the district court must consider national uniformity; otherwise, CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability."); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (agreeing with Third Circuit that "successor liability under CERCLA is governed by federal law.") Cf. Denver v. Adolph Coors Co., 813 F. Supp. 1471, 1474 (D. Colo. 1992) (federal common law governs issues of corporate capacity to be sued); see also November 17, 1995, Order (rejecting application of state law of "piercing the corporate veil" to find parent AMCO liable for actions of its subsidiaries BZC and LSSC).

25. The broad remedial purpose of CERCLA requires application of the more flexible continuity of enterprise theory of successor liability to prevent responsible parties from evading CERCLA liability through strategic behavior or transactional technicalities. United States v. Mexico Feed & Seed Co., 980 F.2d 478, 488 (8th Cir. 1992) ("in the CERCLA context, the imposition of successor liability under the 'substantial continuation [a.k.a. continuity of enterprise]' test is justified by a showing that in substance, if not in form, the successor is a responsible party.");

Atlantic Richfield Co. v. Blossenski, 847 F. Supp. 1261, 1283-85 (E.D. Pa. 1994); see also, Kleen Laundry & Dry Cleaning Servs. v. Total Waste Management, 867 F. Supp. 1136, 1141 (D. N.H. 1994).

26. To find successor liability under the "continuity of enterprise" approach, courts look to the following factors:

- whether the successor retains the same employees;
- whether the successor retains the same supervisory personnel;
- whether the successor retains the same production facilities in the same location;
- whether the successor produces the same products;
- whether there is a continuity of assets and business operations;
- whether the successor retains the same business name; and
- whether the successor holds itself out to the public as a continuation of the previous enterprise.

Carolina Transformer Co., 978 F.2d at 838.

27. Like any other equitable multi-factor test, all eight factors need not be present to support the imposition of successor liability under the continuity of enterprise doctrine. HRW Sys. v. Washington Gas Light Co., 823 F. Supp. 318, 334 (D. Md. 1993) (applying multi-factored *de facto* merger test); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010 (D. Mass. 1989) (same).

28. The continuity of enterprise doctrine evolved to address situations where, as here, a purchaser structures an acquisition

deal under traditional principles of successor liability so as to avoid liability and thereby frustrate the remedial purposes of CERCLA. State of New York v. N. Storonske Cooperage Co., 174 B.R. 366, 373 (N.D. N.Y. 1994) (doctrine developed to prevent strategic behavior by purchasers to structure acquisition deals so as to avoid liability); Carolina Transformer Co., 978 F.2d at 838 (courts must consider whether the acquisition "was part of an effort to continue the business of the former corporation yet avoid its existing or potential state or federal environmental liability").

29. The doctrine is especially applicable to situations where a party shifts all environmental liability--existing and potential--onto a corporate shell that is left either with "dirty assets" or, as is the case here, no assets at all. Mexico Feed & Seed, 980 F.2d at 489; Carolina Transformer Co., 978 F.2d at 838.

30. Plaintiffs have a direct nexus to the operations of the National Zinc enterprise from 1907-73.<sup>10</sup> In particular, Salomon stepped directly into the National Zinc operation. In a similar context, a federal district court ruled that, even where the precise factors for successor liability were not present, equitable considerations dictated that the company that "essentially placed itself into [another's] shoes, so to speak, by continuing all

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<sup>10</sup>Many facts exist in the record that support no per se successor liability by Salomon, St. Joe and ZCA. However, the concept of substantial continuity of interest liability under CERCLA is supported in the record.

aspects [of the other company's] prior practices would succeed to the environmental liabilities of the first company." United States v. Atlas Minerals & Chem., Inc., 1995 U.S. Dist. LEXIS 13,097 at \*262.

31. The fact that Salomon purchased National Zinc before the enactment of CERCLA does not preclude the imposition of successor liability under the continuity of enterprise theory. American National Can Co. v. Kerr Glass Mfg. Corp., 1990 U.S. Dist. LEXIS 10,999 (N.D.Ill. 1990) at \*20 op. withdrawn, in part, recons. denied, in part, 1990 U.S. Dist. LEXIS 11,417 (N.D.Ill. Aug. 29, 1990) (requiring notice of CERCLA liability in a 1938, pre-CERCLA asset purchase would be "anomalous"); United States v. Peirce, 1995 U.S. Dist. LEXIS 4042 (N.D.N.Y. February 18, 1995); Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp., 847 F. Supp. 389 (E.D. Va. 1994) (1972 asset purchase).

32. "Federally permitted releases", which are defined by reference to existing law, are not considered hazardous and are not therefore subject to the provisions of CERCLA. Joy v. The Louisiana Conference Association of Seventh-Day Adventists, 1992 WL 165670 at \*4 (E.D. La.). See 42 U.S.C. § 9607(j).

33. Recovery can be made, however, for permitted release response costs that (1) were not expressly permitted, (2) exceeded the limitations of the permit, or (3) occurred at a time when there was no permit. United States v. Iron Mountain Mines, Inc., 812 F.

Supp. 1528, 1541 (E.D. Cal. 1992), citing State of Idaho v. Bunker Hill, 635 F. Supp. 665, 673-74 (Idaho 1986).

34. The party claiming exemption for the release of hazardous substances (in this case, the Plaintiffs) bears the burden of proving which releases are federally permitted and what portion of the damages are allocable to the federally permitted releases. Lincoln Properties, Ltd., 1993 WL 217429 at \*16 (E.D. Cal.), citing United States v. Shell Oil Co., 1992 WL 144296 at \*6 (C.D. Cal.). See also In re Acushnet River and New Bedford Harbor, 722 F. Supp. 893 (D. Mass. 1989)<sup>11</sup>

35. As to both the retort smelter and the electrolytic refinery, Plaintiffs have failed to meet their burden of proving which releases were federally permitted and which were not. The Court finds, and the parties admit, that individual sources of lead and cadmium cannot be fingerprinted.

36. Plaintiffs are entitled to prejudgment interest for amounts recoverable under CERCLA. 42 U.S.C. § 9607(a)(4).

37. Prejudgment interest "accrues from the later of (i) the date payment of a specified amount is demanded in writing, or (ii)

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<sup>11</sup>Plaintiffs point out that Acushnet River in this case would require Cyprus to meet a burden of production: introducing evidence sufficient to warrant a factfinder's conclusion that the damages from exemptions are indivisible. Id. at n.9. The Court notes, however, the Acushnet River court pointed out that neither the Restatement (Second) of Torts nor decided CERCLA cases explicitly required such a burden be placed on the opposing party. Id.

the date of the expenditure concerned." 42 U.S.C. § 9607(a).

38. The statute "clearly requires a written demand for specified response costs". Bancamerica Commercial Corp. v. Trinity Industries, 900 F. Supp. 1427 (D. Kan. 1995). Courts are split, however, on what form the demand must take. Several district courts have held that such written demand must include a specific dollar amount. State of Colorado v. United States, 867 F. Supp. 948, 950 (D. Colo. 1994). See also United States v. Hardage, 750 F. Supp. 1460, 1505 (W.D. Okla. 1990), *aff'd in part, rev'd in part*, 982 F.2d 1436 (10th Cir. 1992).

39. The Fifth Circuit Court of Appeals holds, however, that the Complaint constitutes a sufficient written demand for payment, even if the Complaint does not specify an exact amount, as is the case here. In the Matter of Bell Petroleum Services, Inc., 3 F.3d 889 (5th Cir. 1993). See also American Color & Chemical Co. v. Tenneco Polymers, Inc. 1995 WL 813221 (D. S.C.) (applying Bell Petroleum Services).

40. Because there is no evidence in the record indicating that a written demand for payment was made by Plaintiffs to Cyprus, the Court holds that the filing of the Complaint constitutes such demand, as per Bell Petroleum Services. Therefore, as to costs incurred before the Complaint was filed, prejudgment interest, as calculated per the formula in 42 U.S.C. § 9607(a)(4), should be assessed from the date the Complaint was filed. With respect to

costs, if any, incurred after the Complaint was filed, prejudgment interest should be assessed from the date of the expenditures. Cyprus also is entitled to prejudgment interest as to off-site Operable Unit One expenditures post-August 1995.

41. Plaintiffs (Salomon, St. Joe and ZCA) are to be granted judgment against Cyprus for 30 percent of the total sum reflected in Finding of Fact No. 99, which is \$10,134,354 (30 percent equals \$3,040,306), plus prejudgment interest thereon; and Defendant Cyprus is to be granted judgment against Plaintiffs on its counterclaim for 70 percent of the approximate sum of \$700,000 (yet to be determined) plus prejudgment interest thereon.

42. The parties are hereby ordered to submit an agreed Judgment in keeping with these Findings of Fact and Conclusions of Law, including the rate and amount of prejudgment interest allowable to Plaintiffs and to Cyprus, within 20 days of the date of this Order. Failing in such, a hearing thereon will be held on May 1<sup>st</sup>, 1996, at 1:30 p.m. and each party is to submit proposed Findings of Fact and Conclusions of Law (not to exceed five pages) on the prejudgment interest issue and a proposed judgment in accordance with these Findings of Fact and Conclusions of Law<sup>12</sup> within three days in advance of the hearing.

IT IS SO ORDERED, this 2<sup>nd</sup> day of April, 1996.

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<sup>12</sup>Such proposed judgment also should include the exact total, as reflected in the record, of the funds expended by Cyprus on Operable Unit One after Salomon stopped participating in the remediation with Cyprus in August 1995.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written in dark ink.

THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JACK DALRYMPLE and ROSEMARY  
DALRYMPLE, et. al.,

Plaintiffs,

v.

Case No. 94-C-970-H

GRAND RIVER DAM AUTHORITY,

Defendant/Third  
Party Plaintiff,

v.

UNITED STATES OF AMERICA  
ex rel FEDERAL ENERGY  
REGULATORY COMMISSION; and  
UNITED STATES ARMY CORPS OF  
ENGINEERS,

Third Party  
Defendants.

**ORDER**

This matter comes before the Court on Plaintiffs' Motion to Remand (Docket #4).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of inverse condemnation, consequential damage to private property for public use, strict liability, trespass, nuisance, and injunction against Defendant Grand River Dam Authority ("GRDA"). Plaintiffs contend that they sustained damage to their property as a result of the release of water from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla. Stat. Ann. § 861, which operates the Pensacola Dam

pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC").

GRDA removed this action to the United States District Court for the Northern District of Oklahoma on October 14, 1994, alleging that jurisdiction is proper under 28 U.S.C. §§ 1441(b) and 1442(a)(1). On October 21, 1994, GRDA filed a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). In an Order entered on this date, the Court dismissed the Third-Party Complaint against the United States. The Court now considers Plaintiffs' motion to remand.

## I.

GRDA claims that removal is proper under Section 1442(a)(1) because it was acting pursuant to the direction of a federal officer when it released the waters that allegedly flooded Plaintiffs' property. Section 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color or such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(emphasis added). GRDA alleges that it is entitled to remove the action under Section 1442(a)(1) because it operates the dam pursuant to a license from FERC and because the Corps directs releases from Grand Lake when the water level is within the flood pool.

Removal under Section 1442(a)(1) must be predicated upon the averment of a colorable

federal defense to Plaintiffs' claims. Mesa v. California, 489 U.S. 121, 139 (1989). Although a defendant need not prove that it would prevail on its federal immunity defense in order to obtain removal, see Willingham v. Morgan, 395 U.S. 402, 407 (1969), a defendant must "allege facts that would support a colorable immunity defense if those facts were true," State v. Ivory, 906 F.2d 999, 1002 (4th Cir. 1990).

GRDA contends that it has satisfied this requirement by asserting a claim of "shared immunity" with the federal government. Specifically, GRDA relies upon the "government contractor's immunity" recognized by the Supreme Court in Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1939). The Supreme Court has recognized government contractor's immunity in a products liability action against a manufacturer who manufactured allegedly defective products under a contract with the federal government and in accordance with government specifications. Boyle v. United Technologies Corp., 487 U.S. 500 (1988). Government contractor's immunity has also barred claims against a construction company performing labor for the government pursuant to a government contract. Yearsley, 309 U.S. 18. GRDA has offered no evidence that it is either producing goods or performing labor pursuant to a government contract. Rather, GRDA owns and operates its own facility. The mere fact that it is licensed by FERC does not transform it into a government contractor for purposes of securing federal immunity. In fact, to the contrary, the statutory terms incorporated into the license itself specifically render GRDA, as licensee, liable for damages incurred by third parties as a result of the licensee's operation of its project. Section 10(c) of the Federal Power Act provides:

All licenses issued under this subchapter shall be on the following conditions:

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

16 U.S.C. § 803(c) (emphasis added); see Henry Ford & Son v. Little Falls Fibre Co., 280 U.S. 369 (1930) (relying upon Section 803(c) to hold licensee liable to third parties).

GRDA recognizes the applicability of this language, see Def.'s Mem. in Opp'n to Pls.' .

Mot. to Remand at 17 n.16, but seeks to avoid it. GRDA states in brief as follows:

Section 10(c) of the Federal Power Act was enacted in 1920. Section 3 of the Flood Control Act of 1928 (33 U.S.C. § 702(c)) -- the basis for GRDA's claim of shared immunity -- was enacted later. Section 10(c) generally addresses the liability for all federal hydroelectric licensees. Section 3 of the Flood Control Act of 1928 addresses the specific issue of liability for the federal government's flood control activities. As both a later enactment, and a more specific enactment, the provisions of Section 3 of the Flood Control Act of 1928 prevail over the more general provision of Section 10(c) of the Federal Power Act.

Id. GRDA's reliance upon Section 702(c), however, is misplaced. That provision merely states that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702(c). It does not extend that protection to licensees, nor does it even allude to the licensee's role in the flood control process. In fact, one federal appellate court has rejected the notion that Section 702(c) provides "shared immunity" to local water districts operating flood control projects constructed by the Corps.

Taylor Bay Protective Ass'n v. Administrator, United States Envtl. Protection Agency, 884 F.2d

1073 (8th Cir. 1989). By contrast, Section 10(c) of the Federal Power Act deals exclusively with the relationship between licensees and the **federal** government, squarely placing potential liability on licensees and explicitly preserving the **federal** government's immunity. The Court therefore rejects GRDA's claim that it shares in the **general** immunity of the United States when federal law specifically subjects licensees to liability to **third parties**.<sup>1</sup> Because GRDA does not have a colorable federal immunity defense to this action, the Court does not have jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).

## II.

GRDA asserts 28 U.S.C. § 1441(b) as an additional basis for removal. That provision states:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the **Constitution**, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as **defendants** is a citizen of the state in which such action is brought.

In applying Section 1441(b), the Tenth Circuit has held that

the required federal right or immunity **must** be an essential element of the plaintiff's cause of action, and [] the federal controversy must be 'disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.'

Fajen v. Foundation Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir. 1982) (citations omitted). It

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<sup>1</sup>The Court also rejects GRDA's argument that it is entitled to government contractor's immunity because it is acting pursuant to **federal law** and "contracts with the Corps of Engineers." Def.'s Supp. Resp. at 8. Nothing contained in the statutes and regulations cited in support of this proposition transforms them from regulatory provisions issued by a governmental entity into contracts between two consenting parties.

is uncontested that the alleged federal right or immunity is not an element of Plaintiffs' cause of action. Instead, GRDA contends that the "fundamental issues in this case involve federal flood control activities, whether or not Plaintiffs have chosen so to plead those issues." Def.'s Mem. at 22. In support of the proposition that federal law, though unspoken, can so permeate a petition that it mandates removal, GRDA cites Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987). In Taylor, the Supreme Court held that the defense of ERISA preemption need not appear on the face of the complaint because ERISA claims are necessarily federal in character. Id. at 66. The Court has held herein that GRDA has no claim to federal immunity. Furthermore, the Court rejects GRDA's assertion that Plaintiffs' claims are necessarily federal in character. Therefore, there is no basis for removal under Section 1441(b).

Accordingly, Plaintiffs' Motion for Remand is hereby granted (Docket #4). The Clerk of the Court is directed to send a copy of this Order to the Clerk of the District Court of Ottawa County, Oklahoma.

IT IS SO ORDERED.

This 2<sup>ND</sup> day of April, 1996.



Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE 4-3-96

**F I L E D**

APR -2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JACK DALRYMPLE and ROSEMARY  
DALRYMPLE, et. al.,  
Plaintiffs,

v.

Case No. 94-C-970-H

GRAND RIVER DAM AUTHORITY,  
  
Defendant/Third  
Party Plaintiff,

v.

UNITED STATES OF AMERICA  
ex rel FEDERAL ENERGY  
REGULATORY COMMISSION; and  
UNITED STATES ARMY CORPS OF  
ENGINEERS,

Third Party  
Defendants.

**ORDER**

This matter comes before the Court on a Motion to Dismiss filed by each of the Third Party Defendants, the Federal Energy Regulatory Commission (Docket #18) and the United States Army Corps of Engineers (Docket #20).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of inverse condemnation, consequential damage to private property for public use, strict liability, trespass, nuisance, and injunction against Defendant Grand River Dam Authority ("GRDA").

Plaintiffs contend that they sustained damage to their property as a result of the release of water

from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla. Stat. Ann. § 861, which operates the Pensacola Dam pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC").

GRDA removed this action to the United States District Court for the Northern District of Oklahoma on October 14, 1994, alleging that jurisdiction is proper under 28 U.S.C. §§ 1441(b) and 1442(a)(1). On October 21, 1994, GRDA filed a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). FERC and the Corps now challenge this Court's jurisdiction.

Sovereign immunity bars suits against the United States absent an express waiver of immunity. United States v. Mitchell, 445 U.S. 535 (1980). If the sovereign does consent to be sued, it may define the jurisdiction of the court entertaining that suit. Id. at 538. Section 1346 of Title 28 of the United States Code provides:

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . .

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Thus, in those cases in which the United States has waived its immunity as to tort claims, this Court has jurisdiction. Plaintiffs allege various tort claims against GRDA, who, in turn, seeks indemnity from the United States. However, GRDA explicitly acknowledges that the United States possesses immunity from these tort claims. Def.'s Br. in Opp'n to the Third Party Defs.' Mot. to Dismiss Third-Party Compl. at 5. The Court therefore does not have jurisdiction over the portion of the Third-Party Complaint arising out of the tort claims.

Plaintiffs also assert two claims for inverse condemnation. Inverse condemnation is essentially a claim for just compensation for the taking of property as required by the Fifth Amendment to the United States Constitution. Plaintiffs seek "just compensation" for each Plaintiff "in excess of \$50,000" from GRDA, who seeks full indemnification from the United States. This constitutes a claim in excess of \$10,000 that is founded upon the United States Constitution, thus divesting this Court of its jurisdiction.

Section 1491(a)(1) of Title 28 of the United States Code provides in pertinent part:

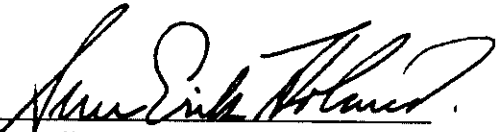
The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Court of Federal Claims therefore has concurrent jurisdiction over all civil actions against the United States arising under the Constitution for claims "not exceeding \$10,000," see 28 U.S.C. § 1346(a)(2), and exclusive jurisdiction over those actions, such as this, that seek damages in excess of \$10,000.

Accordingly, the Court hereby dismisses GRDA's claims against FERC and the Corps for lack of subject matter jurisdiction (Dockets #18,20).

IT IS SO ORDERED.

This 2<sup>nd</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

EVERETT R. WAGONER and  
MADELINE WAGONER,

Plaintiffs,

v.

Case No. 94-C-1091-H ✓

GRAND RIVER DAM AUTHORITY  
and RONALD COKER, in his official  
capacity as General Manager and Chief  
Executive Officer of the Grand River  
Dam Authority,

Defendants/Third  
Party Plaintiffs,

v.

UNITED STATES OF AMERICA  
ex rel FEDERAL ENERGY  
REGULATORY COMMISSION; and  
UNITED STATES ARMY CORPS OF  
ENGINEERS,

Third Party  
Defendants.

**ORDER**

This matter comes before the Court on a Motion to Dismiss filed by each of the Third Party Defendants, the Federal Energy Regulatory Commission (Docket #16) and the United States Army Corps of Engineers (Docket #13).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of trespass and inverse condemnation against Defendants Grand River Dam Authority ("GRDA") and Ronald Coker. Plaintiffs contend that they sustained damage to their property as a result of the

release of water from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla. Stat. Ann. § 861, which operates the Pensacola Dam pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC"). Mr. Coker is the General Manager and Chief Executive Officer of GRDA.

Defendants removed this action to the United States District Court for the Northern District of Oklahoma on April 12, 1994. Concluding that Defendants had not offered any evidence to establish that they were acting under the control of a federal officer, the United States District Court remanded the case to the District Court of Ottawa County. Plaintiffs then filed an amended petition. Defendants filed an answer, asserting a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). Defendants then removed the action to the United States District Court again. FERC and the Corps now challenge this Court's jurisdiction.

Sovereign immunity bars suits against the United States absent an express waiver of immunity. United States v. Mitchell, 445 U.S. 535 (1980). If the sovereign does consent to be sued, it may define the jurisdiction of the court entertaining that suit. Id. at 538. Section 1346 of Title 28 of the United States Code provides:

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . .

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would

be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Thus, in those cases in which the United States has waived its immunity as to tort claims, this Court has jurisdiction. Plaintiffs allege a claim of trespass against Defendants/Third Party Plaintiffs, who, in turn, seek indemnity from the United States. However, Defendants/Third Party Plaintiffs explicitly acknowledge that the United States possesses immunity from this tort claim. Defs.' Br. in Opp'n to the Third Party Defs.' Mot. to Dismiss Third-Party Compl. at 1, 6. The Court therefore does not have jurisdiction over the portion of the Third-Party Complaint arising out of the tort claim.

Plaintiffs also assert a claim for inverse condemnation. Inverse condemnation is essentially a claim for just compensation for the taking of property as required by the Fifth Amendment to the United States Constitution. Plaintiffs seek "in excess of \$10,000" from Defendants/Third Party Plaintiffs, who seek full indemnification from the United States. This constitutes a claim in excess of \$10,000 that is founded upon the United States Constitution, thus divesting this Court of its jurisdiction.

Section 1491(a)(1) of Title 28 of the United States Code provides in pertinent part:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Court of Federal Claims therefore has concurrent jurisdiction over all civil actions against the United States arising under the Constitution for claims "not exceeding \$10,000," see 28 U.S.C. § 1346(a)(2), and exclusive jurisdiction over those actions, such as this, that seek damages in excess of \$10,000.

Accordingly, the Court hereby dismisses the Defendants'/Third Party Plaintiffs' claims against

FERC and the Corps for lack of subject **matter** jurisdiction (Dockets #13,16).

IT IS SO ORDERED.

This 2<sup>ND</sup> day of April, 1996.

A handwritten signature in black ink, appearing to read "Sven Erik Holmes", written over a horizontal line.

Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA **F I L E D**

APR - 2 1996 *fa*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WAYNE E. ROBERTS,

Plaintiff,

v.

Case No. 94-C-1092-H ✓

GRAND RIVER DAM AUTHORITY  
and RONALD COKER, in his official  
capacity as General Manager and Chief  
Executive Officer of the Grand River  
Dam Authority,

Defendants/Third  
Party Plaintiffs,

v.

UNITED STATES OF AMERICA  
ex rel FEDERAL ENERGY  
REGULATORY COMMISSION; and  
UNITED STATES ARMY CORPS OF

**ORDER**

This matter comes before the Court on a Motion to Dismiss filed by each of the Third Party Defendants, the Federal Energy Regulatory Commission (Docket #19) and the United States Army Corps of Engineers (Docket #14).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of trespass and inverse condemnation against Defendants Grand River Dam Authority ("GRDA") and Ronald Coker. Plaintiffs contend that they sustained damage to their property as a result of the release of water from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla. Stat. Ann. § 861, which operates the

Pensacola Dam pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC"). Mr. Coker is the General Manager and Chief Executive Officer of GRDA.

Defendants removed this action to the United States District Court for the Northern District of Oklahoma on April 12, 1994. Concluding that Defendants had not offered any evidence to establish that they were acting under the control of a federal officer, the United States District Court remanded the case to the District Court of Ottawa County. Plaintiffs then filed an amended petition. Defendants filed an answer, asserting a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). Defendants then removed the action to the United States District Court again. FERC and the Corps now challenge this Court's jurisdiction.

Sovereign immunity bars suits against the United States absent an express waiver of immunity. United States v. Mitchell, 445 U.S. 535 (1980). If the sovereign does consent to be sued, it may define the jurisdiction of the court entertaining that suit. Id. at 538. Section 1346 of Title 28 of the United States Code provides:

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . .

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Thus, in those cases in which the United States has waived its immunity as to tort claims, this Court

has jurisdiction. Plaintiffs allege a claim of **trespass** against Defendants/Third Party Plaintiffs, who, in turn, seek indemnity from the United States. However, Defendants/Third Party Plaintiffs explicitly acknowledge that the United States possesses immunity from this tort claim. Defs.' Br. in Opp'n to the Third Party Defs.' Mot. to Dismiss **Third-Party** Compl. at 1, 6. The Court therefore does not have jurisdiction over the portion of the **Third-Party** Complaint arising out of the tort claim.

Plaintiffs also assert a claim for **inverse condemnation**. Inverse condemnation is essentially a claim for just compensation for the **taking of property** as required by the Fifth Amendment to the United States Constitution. Plaintiffs seek "**in excess of \$10,000**" from Defendants/Third Party Plaintiffs, who seek full indemnification from the United States. This constitutes a claim in excess of \$10,000 that is founded upon the **United States** Constitution, thus divesting this Court of its jurisdiction.

Section 1491(a)(1) of Title 28 of the **United States** Code provides in pertinent part:

The United States Court of Federal **Claims** shall have jurisdiction to render judgment upon any claim against the **United States** founded either upon the Constitution, or any Act of Congress or any regulation of **an executive** department, or upon any express or implied contract with the **United States**, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Court of Federal Claims therefore has **concurrent** jurisdiction over all civil actions against the United States arising under the Constitution for claims "not exceeding \$10,000," see 28 U.S.C. § 1346(a)(2), and exclusive jurisdiction over **those** actions, such as this, that seek damages in excess of \$10,000.

Accordingly, the Court hereby **dismisses the Defendants'/Third Party Plaintiffs'** claims against  
FERC and the Corps for lack of subject **matter jurisdiction** (Dockets #19,14).

IT IS SO ORDERED.

This 2<sup>ND</sup> day of April, 1996.

A handwritten signature in black ink, appearing to read "Sven Erik Holmes", written over a horizontal line.

Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

EVERETT R. WAGONER and  
MADELINE WAGONER,

Plaintiffs,

v.

GRAND RIVER DAM AUTHORITY  
and RONALD COKER, in his official  
capacity as General Manager and Chief  
Executive Officer of the Grand River  
Dam Authority,

Defendants/Third  
Party Plaintiffs,

v.

UNITED STATES OF AMERICA  
ex rel FEDERAL ENERGY  
REGULATORY COMMISSION; and  
UNITED STATES ARMY CORPS OF  
ENGINEERS,

Third Party  
Defendants.

WAYNE E. ROBERTS,

Plaintiff,

v.

GRAND RIVER DAM AUTHORITY  
and RONALD COKER, in his official  
capacity as General Manager and Chief  
Executive Officer of the Grand River  
Dam Authority,

Defendants/Third  
Party Plaintiffs,

v.

UNITED STATES OF AMERICA  
ex rel FEDERAL ENERGY  
REGULATORY COMMISSION; and  
UNITED STATES ARMY CORPS OF

Case No. 94-C-1091-H

Case No. 94-C-1092-H

ENGINEERS,

Third Party  
Defendants.

)  
)  
)  
)

### ORDER

This matter comes before the Court on Plaintiffs' Motion to Remand (Docket #9).

Plaintiffs brought this action in the District Court of Ottawa County, alleging claims of trespass and inverse condemnation against Defendants Grand River Dam Authority ("GRDA") and Ronald Coker. Plaintiffs contend that they sustained damage to their property as a result of the release of water from the Pensacola Dam by GRDA. GRDA is a conservation and reclamation district created within the State of Oklahoma by 82 Okla. Stat. Ann. § 861, which operates the Pensacola Dam pursuant to a license issued by the Federal Energy Regulatory Commission ("FERC"). Mr. Coker is the General Manager and Chief Executive Officer of GRDA.

Defendants removed this action to the United States District Court for the Northern District of Oklahoma on April 12, 1994. Concluding that Defendants had not offered any evidence to establish that they were acting under the control of a federal officer, the United States District Court remanded the case to the District Court of Ottawa County. Plaintiffs then filed an amended petition. Defendants filed an answer, asserting a third party claim for indemnification against FERC and the United States Army Corps of Engineers ("Corps"). Defendants then removed the action to the United States District Court again, alleging that jurisdiction is proper under 28 U.S.C. §§ 1441(b) and 1442(a)(1). In an Order entered on this date, the Court dismissed the Third-Party Complaint against the United States. The Court now considers Plaintiffs' motion to remand.

## I.

Defendants claim that removal is proper under Section 1442(a)(1) because GRDA was acting pursuant to the direction of a federal officer when it released the waters that allegedly flooded Plaintiffs' property. Section 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(emphasis added). Defendants allege they are entitled to remove the action under Section 1442(a)(1) because GRDA operates the dam pursuant to a license from FERC and because the Corps directs releases from Grand Lake when the water level is within the flood pool.

Removal under Section 1442(a)(1) must be predicated upon the averment of a colorable federal defense to Plaintiffs' claims. Mesa v. California, 489 U.S. 121, 139 (1989). Although a defendant need not prove that it would prevail on its federal immunity defense in order to obtain removal, see Willingham v. Morgan, 395 U.S. 402, 407 (1969), a defendant must "allege facts that would support a colorable immunity defense if those facts were true," State v. Ivory, 906 F.2d 999, 1002 (4th Cir. 1990).

Defendants contend that it has satisfied this requirement by asserting a claim of "shared immunity" with the federal government. Specifically, Defendants rely upon the "government contractor's immunity" recognized by the Supreme Court in Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1939). The Supreme Court has recognized government contractor's immunity in a products liability action against a manufacturer who manufactured allegedly defective products under a contract with the federal government and in accordance with government specifications. Boyle v. United Technologies Corp., 487 U.S. 500 (1988). Government contractor's immunity has

also barred claims against a construction company performing labor for the government pursuant to a government contract. Yearsley, 309 U.S. 18. Defendants have offered no evidence that GRDA is either producing goods or performing labor pursuant to a government contract. Rather, GRDA owns and operates its own facility. The mere fact that it is licensed by FERC does not transform it into a government contractor for purposes of securing federal immunity. In fact, to the contrary, the statutory terms incorporated into the license itself specifically render GRDA, as licensee, liable for damages incurred by third parties as a result of the licensee's operation of its project. Section 10(c) of the Federal Power Act provides:

All licenses issued under this subchapter shall be on the following conditions:

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

16 U.S.C. § 803(c) (emphasis added); see Henry Ford & Son v. Little Falls Fibre Co., 280 U.S. 369 (1930) (relying upon Section 803(c) to hold licensee liable to third parties).

Defendants recognize the applicability of this language, see Defs.' Mem. in Opp'n to Pls.' Mot. to Remand at 19 n.12, but seek to avoid it. Defendants state in brief as follows:

Section 10(c) of the Federal Power Act was enacted in 1920. Section 3 of the Flood Control Act of 1928 (33 U.S.C. § 702(c)) -- the basis for GRDA's claim of shared immunity -- was enacted later. Section 10(c) generally addresses the liability for all federal hydroelectric licensees. Section 3 of the Flood Control Act of 1928 addresses the specific issue of liability for the federal government's flood control activities. As both a later enactment, and a more specific enactment, the provisions of Section 3 of the Flood Control Act of 1928 prevail over the more general provision of Section 10(c) of the Federal Power Act.

Id. Defendants' reliance upon Section 702(c), however, is misplaced. That provision merely states that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702(c). It does not extend that protection to licensees, nor does it even allude to the licensee's role in the flood control process. In fact, one federal appellate court has rejected the notion that Section 702(c) provides "shared immunity" to local water districts operating flood control projects constructed by the Corps. Taylor Bay Protective Ass'n v. Administrator, United States Envtl. Protection Agency, 884 F.2d 1073 (8th Cir. 1989). By contrast, Section 10(c) of the Federal Power Act deals exclusively with the relationship between licensees and the federal government, squarely placing potential liability on licensees and explicitly preserving the federal government's immunity. The Court therefore rejects Defendants' claim that they share in the general immunity of the United States when federal law specifically subjects licensees to liability to third parties.<sup>1</sup> Because Defendants do not have a colorable federal immunity defense to this action, the Court does not have jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).

## II.

Defendants assert 28 U.S.C. § 1441(b) as an additional basis for removal. That provision states:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

In applying Section 1441(b), the Tenth Circuit has held that

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<sup>1</sup>The Court also rejects Defendants' argument that it is a government contractor because "GRDA's operation of the dam is pursuant to federal contracts entered into under federal statutes and regulations." Defs.' Supp. Resp. at 8. Nothing contained in the statutes and regulations cited in support of this proposition transforms them from regulatory provisions issued by a governmental entity into contracts between two consenting parties.


the required federal right or immunity must be an essential element of the plaintiff's cause of action, and [] the federal controversy must be 'disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.'

Fajen v. Foundation Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir. 1982) (citations omitted). It is uncontested that the alleged federal right or immunity is not an element of Plaintiffs' cause of action. Instead, Defendants contend that the "fundamental issues in this case involve federal flood control activities, whether or not Plaintiff has chosen so to plead those issues." Defs.' Mem. at 23. In support of the proposition that federal law, though unspoken, can so permeate a petition that it mandates removal, Defendants cite Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987). In Taylor, the Supreme Court held that the defense of ERISA preemption need not appear on the face of the complaint because ERISA claims are necessarily federal in character. Id. at 66. The Court has held herein that Defendants have no claim to federal immunity. Furthermore, the Court rejects Defendants' assertion that Plaintiffs' claims are necessarily federal in character. Therefore, there is no basis for removal under Section 1441(b).

Accordingly, Plaintiffs' Motions for Remand are hereby granted (Docket #9). The Clerk of the Court is directed to send a copy of this Order to the Clerk of the District Court of Ottawa County, Oklahoma.

IT IS SO ORDERED.

This 2<sup>nd</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
APR 03 1996  
DATE \_\_\_\_\_

DANNY MEYERS,

Plaintiff,

vs.

No. 94-C-342-K ✓

HAYSSSEN MANUFACTURING CO.,  
a/k/a HAYSSSEN MFG. CO., a  
corporation; FLUOR CONSTRUCTORS,  
INC., a corporation; FLUOR DANIEL,  
INC., formerly FLUOR ENGINEERS,  
INC., a corporation,

Defendants.

**FILED**

APR 02 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**J U D G M E N T**

In accordance with the jury verdict filed on February 26, 1996, judgment is hereby entered in favor of Defendant Hayssen Manufacturing Company, a/k/a Hayssen Mfg. Co., a corporation, and against the Plaintiff, Danny Meyers.

ORDERED this 1 day of April, 1996.



TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**APR - 2 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

A.G. EDWARDS TRUST COMPANY,  
TRUSTEE OF THE JERRY N. UPTON  
CHARITABLE TRUST,

Plaintiff,

vs.

Case No. 94-C-1093-K

STRUTHERS INDUSTRIES, INC. and  
LIBERAL HULL COMPANY,

Defendants.

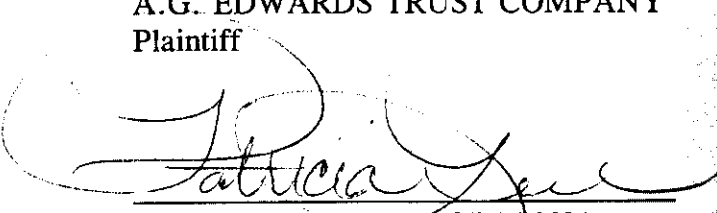
ENTERED ON DOCKET  
DATE **APR 03 1996**

**STIPULATION OF DISMISSAL WITH PREJUDICE**

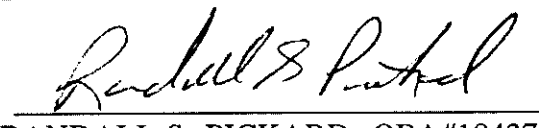
COME NOW the Plaintiff and the Defendants, by and through their respective counsel, and hereby stipulate that this **action** should be, and hereby is, dismissed with prejudice by reason of settlement. Each party shall bear its own attorney fees and costs.

A.G. EDWARDS TRUST COMPANY  
Plaintiff

STRUTHERS INDUSTRIES, INC.  
LIBERAL HULL COMPANY  
Defendants

  
PATRICIA E. NEEL, OBA#6601  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
502 W. 6th St.  
Tulsa, OK 74119-1010  
(918) 587-3161

Attorney for Plaintiff

  
RANDALL S. PICKARD, OBA#10437  
610 Oneok Plaza  
100 W. 5th St.  
Tulsa, OK 74103-4289  
(918) 585-5553

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**APR - 2 1996**

FRANK NORRIS GOODMAN, JR. and )  
CHERYL GOODMAN, )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Plaintiffs, )

v. )

No. 95-C-532-E

STRATFORD INSURANCE COMPANY, a )  
foreign corporation, )

ENTERED ON DOCKET

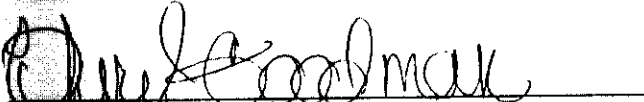
Defendant. )


DATE APR 03 1996

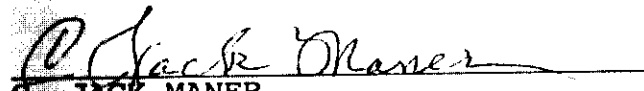
**STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE**

COME NOW the Plaintiffs, their attorney of record, and Defendant's counsel, and would show the court that this matter has been compromised and settled and, therefore, move the court for an Order Of Dismissal With Prejudice.

  
FRANK NORRIS GOODMAN, JR.

  
CHERYL GOODMAN

  
PAUL T. BOUDREAUX  
Attorney for Plaintiffs

  
C. JACK MANER  
Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LUTHER LEE CRISWELL; CONNIE  
CRISWELL; COUNTY TREASURER,  
Mayes County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Mayes  
County, Oklahoma,

Defendants.

**FILED**

MAR 20 1996

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 03 1996

Civil Case No. 95 C 843C

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 20 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Mayes County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, appear by Charles A. Ramsey, Assistant District Attorney, Mayes County, Oklahoma; and the Defendants, LUTHER LEE CRISWELL and CONNIE CRISWELL, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, COUNTY TREASURER, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on August 29, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on August 29, 1995, by Certified Mail.

The Court further finds that the Defendants, LUTHER LEE CRISWELL and CONNIE CRISWELL, were served by publishing notice of this action in the Pryor Daily

Times, a newspaper of general circulation in Mayes County, Oklahoma, once a week for six (6) consecutive weeks beginning October 24, 1995, and continuing through November 28, 1995, as more fully appears from the **verified** proof of publication duly filed herein; and that this action is one in which service by **publication** is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff **does not** know and with due diligence cannot ascertain the whereabouts of the Defendants, LUTHER LEE CRISWELL and CONNIE CRISWELL, and service cannot be made upon said **Defendants** within the Northern Judicial District of Oklahoma or the State of Oklahoma by **any other** method, or upon said Defendants without the Northern Judicial District of Oklahoma **or the State of Oklahoma** by any other method, as more fully appears from the evidentiary **affidavit** of a bonded abstracter filed herein with respect to the last known address of the **Defendants**, LUTHER LEE CRISWELL and CONNIE CRISWELL. The Court conducted an **inquiry** into the sufficiency of the service by publication to comply with due process **of law** and based upon the evidence presented together with affidavit and documentary **evidence finds** that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity **of the parties** served by publication with respect to their present or last known place of residence **and/or** mailing address. The Court accordingly approves and confirms that the service **by publication** is sufficient to confer jurisdiction upon this Court to enter the relief sought **by the Plaintiff**, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Mayes County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, filed their Answer on September 5, 1995; and that the Defendants, LUTHER LEE CRISWELL and CONNIE CRISWELL, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, LUTHER LEE CRISWELL and CONNIE CRISWELL, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Thirteen (13), Block Fifty-four (54), Original Township of Pryor Creek, Mayes County, Oklahoma, according to the recorded plat and original survey thereof.**

The Court further finds that on August 2, 1988, the Defendant, LUTHER LEE CRISWELL, executed and delivered to MORTGAGE CLEARING CORPORATION, his mortgage note in the amount of \$35,188.00, payable in monthly installments, with interest thereon at the rate of Eleven percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, LUTHER LEE CRISWELL, a single person, executed and delivered to MORTGAGE CLEARING CORPORATION, a mortgage dated August 2, 1988, covering the above-described property. Said mortgage was recorded on August 9, 1988, in Book 690, Page 611, in the records of Mayes County, Oklahoma.

The Court further finds that on August 9, 1988, MORTGAGE CLEARING CORPORATION, assigned the above-described mortgage note and mortgage to FOSTER MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on October 17, 1988, in Book 693, Page 522, in the records of Mayes County, Oklahoma. This Assignment was re-recorded on October 21, 1988, in Book 693, Page 691, in the records of Mayes County, Oklahoma, to correct the address of Foster Mortgage Corporation.

The Court further finds that on June 1, 1989, FOSTER MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to CENLAR FEDERAL SAVINGS BANK. This Assignment of Mortgage was recorded on July 3, 1989, in Book 703, Page 68, in the records of Mayes County, Oklahoma.

The Court further finds that on August 10, 1989, CENLAR FEDERAL SAVINGS BANK, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C. This Assignment of Mortgage as recorded on August 25, 1989, in Book 705, Page 87, in the records of Mayes County, Oklahoma.

The Court further finds that on July 1, 1989, the Defendant, LUTHER LEE CRISWELL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on July 1, 1990, July 1, 1991 and July 1, 1992.

The Court further finds that the Defendant, LUTHER LEE CRISWELL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due

thereon, which default has continued, and that by reason thereof the Defendant, LUTHER LEE CRISWELL, is indebted to the Plaintiff in the principal sum of \$55,816.55, plus interest at the rate of 11 percent per annum from March 24, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, LUTHER LEE CRISWELL and CONNIE CRISWELL, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, LUTHER LEE CRISWELL, in the principal sum of \$55,816.55, plus interest at the rate of 11 percent per annum from March 24, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, LUTHER LEE CRISWELL, CONNIE CRISWELL, COUNTY TREASURER

and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, LUTHER LEE CRISWELL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall **be issued** to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and

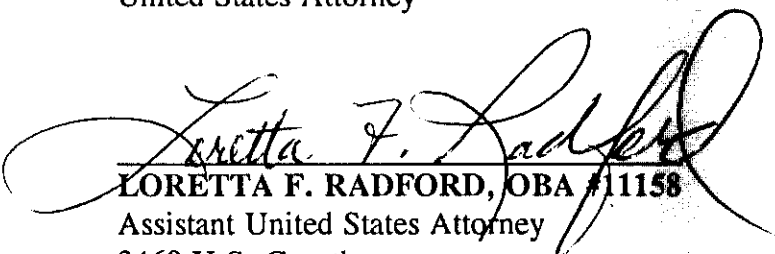
decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

(Signed) H. Dale Cook

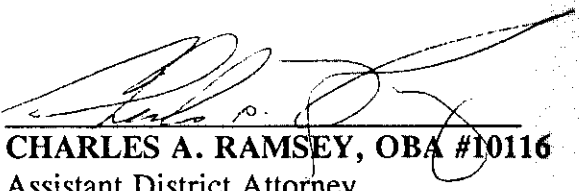
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



CHARLES A. RAMSEY, OBA #10116  
Assistant District Attorney  
P.O. Box 845  
Pryor, OK 74362  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Mayes County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 843C

LFR:flv

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FREEMAN BUILDERS SUPPLY, INC.,  
an Oklahoma corporation,

Plaintiff,

vs.

ROBERTSON BUILDING PRODUCTS,  
a division of UNITED DOMINION  
INDUSTRIES, a Pennsylvania corporation,

Defendant.

Case No. 95-C-125H

**FILED**

APR 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER OF DISMISSAL**

This matter comes on for hearing on the joint Stipulation of the Plaintiff, Freeman Builders Supply, Inc., and Defendant, United Dominion Industries, for a dismissal with prejudice of the above captioned cause against Defendant, United Dominion Industries. The Court, being fully advised, having reviewed the Stipulation, finds that the above entitled cause should be dismissed with prejudice to the filing of a future action as to Defendant, United Dominion Industries, pursuant to said Stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above entitled cause against Defendant, United Dominion Industries, be and is hereby dismissed with prejudice to the filing of a future action against said Defendant, the parties to bear their own respective costs.

Dated this 1st day of April, 1996.

S/ SVEN ERIK HOLMER

UNITED STATES DISTRICT COURT JUDGE

ENTERED ON DOCKET  
DATE 4-3-96  
**F I L E D**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PENN-AMERICA INSURANCE COMPANY,  
a Pennsylvania corporation,

Plaintiff,

v.

R & S PROPERTIES OF TULSA, INC., and  
JEMW REALTY CORPORATION, d/b/a  
TWIN OAKS APARTMENTS,

Defendants.

Case No. 94-CV-615-H ✓

**ORDER**

This matter comes before the Court on Plaintiff's Motion for Summary Judgment (Docket # 8) and Defendants' Motion for Summary Judgment (Docket # 10). Plaintiff instituted this declaratory judgment action requesting an order from this Court declaring that it has no duty either to defend or to indemnify Defendants for a lawsuit filed in Tulsa County District Court entitled Sandy Jones v. R&S Properties of Tulsa, Inc. and JEMW Realty Corporation, d/b/a Twin Oaks Apartments, Case No. CJ-94-01974.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute **between** the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be **evidence** on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is **sufficient** evidence favoring the nonmoving party for a jury to return a verdict for that party. If the **evidence** is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

## II.

All parties believe that **summary judgment** is appropriate in this case. In considering the instant motions, the Court accepts as true **the facts** set forth in the joint statement of stipulated facts filed by the parties on June 12, 1995. **The facts** are as follows:

1. Penn-America Insurance Company is a Pennsylvania corporation with its principal place of business in Hatboro, Pennsylvania.
2. R & S Properties is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma. JEMW Realty Corporation, d/b/a Twin Oak Apartments is a New York corporation.
3. The defendants waive any **objections** to service of process and venue. The parties stipulate that this Court has jurisdiction to **hear this case**.
4. The United States District Court for the Northern District of Oklahoma has jurisdiction, pursuant to 28 U.S.C. Section 1332, as there is complete diversity of citizenship between Plaintiff and Defendants herein **with an amount** in controversy in excess of \$50,000.
5. Defendants are corporations **in the business** of managing/leasing/renting residential apartment housing in an apartment complex **known** as Twin Oaks Apartments located at 2523 East 10th Street, Tulsa, Oklahoma.
6. On June 5, 1993, Penn-America Insurance Company issued a commercial policy of insurance insuring R & S Properties, Policy Number PAC1010919, a certified copy of which is attached to the Complaint and a copy of **which is** attached to the stipulated facts as Exhibit A.
7. The policy of insurance **was in full force** and effect on July 23, 1994.
8. Sandy Jones filed a Petition **on May 12, 1994**, and an Amended Petition on December 5, 1994, against Defendants in the District Court of Tulsa County, State of Oklahoma, Case No. CJ-94-01974. A true and accurate **copy** of the Petition is attached to the stipulated

facts as Exhibit B. A true and accurate copy of the Amended Petition is attached to the stipulated facts as Exhibit C.

9. Sandy Jones alleges that she was attacked, beaten, and raped in an unlocked storage area in Defendants' apartment complex known as Twin Oaks Apartments and that she sustained bodily injury as a result. Sandy Jones seeks actual and punitive damages.

10. The sworn deposition testimony of Sandy Jones is attached to the stipulated facts as Exhibit D.

11. The Defendants have made demand upon Plaintiff to defend the underlying lawsuit and indemnify them for any damages Sandy Jones is awarded.

### III.

Because the parties have agreed to the material facts, the only issue before the Court is whether Plaintiff has a duty to defend and indemnify Defendants for the underlying state court lawsuit. When reviewing a contract for insurance, the Court construes the terms of the policy in their plain, ordinary, and popular sense. Penley v. Gulf Ins. Co., 414 P.2d 305, 308 (Okl. 1966). The Court determines whether an insurer has a duty to defend and provide coverage under a policy from the allegations of the underlying complaint or petition filed against the insured. Maryland Casualty Co. v. Willsey, 380 P.2d 254, 258 (Okl. 1963). Accordingly, when the allegations of the complainant constitute facts which, if proven, would bring the insured's liability within the coverage of the policy, then the insurer must defend the insured against the claim. Id. at 258.

In the instant case, the state court plaintiff, Sandy Jones, alleges that she was attacked, beaten, and raped in an unlocked storage area within Defendants' apartment complex. The gravamen of the underlying state court action against the insured is the insured's alleged negligence arising out of its alleged failure to maintain safe premises.

The general liability policy at issue **contains** an assault and battery exclusion which states as follows:

[i]n consideration of the premium **charged** it is hereby understood and agreed that this policy will not provide coverage, **meaning** indemnification or defense costs, arising out of:

“Bodily Injury” or “Property Damage” resulting from assault and battery or physical altercations that occur in, on, or near the insured’s premises;

- 1) Whether or not caused by, **at the instigation of**, or with the direct or indirect involvement of the insured, **the insured’s** employees, patrons or other persons on the insured’s premises, or
- 2) Whether or not caused by **or arising out of** the insured’s failure to properly supervise or keep the insured’s premises in a safe condition.

Assault and battery is not a defined term **under the policy**. Therefore, the Court interprets that term according to its plain and ordinary **meaning**. The Court finds, and Defendants do not contest, that the attack, beating, and rape of Ms. Jones constitutes assault and battery.

The sole remaining question for the Court is whether the above-cited assault and battery provision excludes coverage for Defendants’ claim. Defendants argue that the policy language in the assault and battery exclusion is **ambiguous** because “Penn-America, in drafting its policy, did not use clear and explicit wording that **unquestionably** covers all allegations of negligence. . . .”

Defendants continue that:

[p]aragraph two of the assault and **battery endorsement** is phrased in general, non-specific terms. What is encompassed **within the language** of the Penn-America CGL endorsement is open to varying interpretation. **Penn-America** could have used clear and unmistakable language such as providing **explicitly no coverage** for “claims based on allegations of negligence in not providing security.”


Ms. Jones’ state court petition alleges that **Defendants** were negligent because they did not safely maintain the premises. She states a variety of facts in support of her claim. In reviewing the exclusion for assault and battery, the Court **believes** that Plaintiff has clearly and unambiguously excluded coverage for the instant claims. **The Court** fails to see -- and Defendants have failed to articulate -- any set of facts under which **Defendants** would be found liable to Ms. Jones in the underlying state court lawsuit for negligence, **and** their liability to Ms. Jones would not be “caused

by or arising out of [their] failure to properly supervise or keep the [ ] premises in a safe condition."

Plaintiff is therefore entitled to summary judgment.<sup>1</sup> The Court hereby grants Plaintiff's Motion for Summary Judgment (Docket # 8) and denies Defendants' Motion for Summary Judgment (Docket # 10).

IT IS SO ORDERED.

This 2<sup>ND</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

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<sup>1</sup> Plaintiff has also requested an order stating that it is not liable for any punitive or exemplary damages which may be recovered by Ms. Jones in the underlying state court lawsuit. Based upon the policy exclusion for punitive damages, Defendants concede this point. Moreover, because the Court does not conclude that coverage for Ms. Jones' claim exists, clearly, Plaintiff will not be liable for any punitive damages which may result.

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR - 2 1996 *ja*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MEMBER SERVICES LIFE INSURANCE  
COMPANY, doing business as MEMBER  
SERVICE ADMINISTRATORS, as third  
party administrator of the LIBERTY GLASS  
COMPANY ERISA QUALIFIED EMPLOYEE  
BENEFIT PLAN,

Plaintiff,

v.

Case No. 95-CV-27-H ✓

AMERICAN NATIONAL BANK & TRUST  
COMPANY OF SAPULPA, as Guardian of  
William Brooks Balthis, Debra Leanne Balthis,  
and David D. Balthis; E. TERRILL CORLEY;  
THOMAS F. GANEM; STEVEN R. CLARK;  
BRADFORD J. WILLIAMS; and WALTER  
M. JONES,

Defendants.

**ORDER**

This matter comes before the Court on a Motion for Summary Judgment by Plaintiff Member Services Life Insurance Company, doing business as Member Service Administrators ("MSA") (Docket # 6) and a Motion for Summary Judgment by Defendants American National Bank & Trust Company of Sapulpa ("American"), E. Terrill Corley, Thomas F. Ganem, Stephen R. Clark, Bradford J. Williams (collectively, the "Defendants") (Docket # 7).<sup>1</sup>

In the complaint, MSA seeks a declaratory judgment that MSA is entitled to reimbursement for benefits paid by the Liberty Glass Company's ERISA Qualified Employee

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<sup>1</sup> Defendant Walter M. Jones, who is pro se, filed a disclaimer of "any right, title or interest in or to the funds which are the subject of this litigation" on April 26, 1995. Accordingly, although Plaintiff has not yet dismissed him, he has failed to move for summary judgment or to join in Defendants' pending motion. Because this is a declaratory judgment action and the funds which are the subject of this action are being held in escrow, Mr. Jones is entitled to be dismissed from the case as he does not claim an interest in any part of these funds. The Court hereby dismisses Defendant Jones from this lawsuit without prejudice.

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Benefit Plan (the "Plan"). Alternatively, MSA seeks reimbursement under the equitable doctrine of restitution. Both Plaintiff and Defendants move for summary judgment on all issues.

# I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is **sufficient** evidence favoring the nonmoving party for a jury to return a verdict for that party. If the **evidence** is merely colorable, or is not significantly probative, summary judgment may be **granted**." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

## II.

All parties believe that summary judgment is appropriate in this case. In considering the instant motions, the Court accepts as true the facts set forth in the joint statement of stipulated facts filed by the parties on August 31, 1995. The facts are as follows:

1. On or about the 1st day of August, 1987, Liberty Glass established a self-funded ERISA Qualified Employee Benefit Plan (the "Plan") providing specified welfare benefits to its employees and their beneficiaries, as defined with the Plan and regulated by ERISA, 29 U.S.C. § 1001 et seq.
2. MSA, as Third Party Administrator of this Plan, is responsible for administering claims submitted to the Plan and determining eligibility for benefits under the Plan. MSA is thus a Plan fiduciary.
3. Jeff Balthis, the father of minor children Williams Brooks Balthis, Debra Leanne Balthis, and David Douglas Balthis (the "Balthis children") was employed by Liberty Glass at all times pertinent to the claims set forth by MSA, and as a result the Balthis children are beneficiaries under the Plan.

4. On February 2, 1988, the **Balthis** children suffered severe injuries in a fire caused by a defective BIC lighter, and the Plan **thereafter** paid \$570,368.75 for medical expenses incurred in the treatment of the Balthis children for **injuries** sustained in the fire.

5. At the time the Balthis children suffered their injuries, the Plan had no provision relating to or providing for any right of **recoupment** of Plan benefits from any recovery the Plan beneficiaries might receive from third party **tortfeasors** or wrongdoers.

6. Defendant American National Bank & Trust Company of Sapulpa was appointed guardian of the Balthis children and **commenced an** action against BIC Corporation in the District Court of Creek County, Oklahoma, **alleging the** BIC Corporation was liable under the doctrine of manufacturers' products liability for the **injuries** to the minor children and resulting damages.

7. The Plan was amended on **October 21, 1988**, to include a provision under which the Plan could recoup, from Plan beneficiaries, **any** money received by the beneficiaries from a negligent third party (or such party's **insurance carrier**) that was responsible for the beneficiaries' injuries and for which the Plan paid benefits. The Plan amendment provided that it was retroactively effective as of March 1, 1988.

8. During the lawsuit and **before the date** of judgment, demand was made on behalf of the Plan against Defendant American National Bank & Trust Company of Sapulpa (the "guardian"), and BIC Corporation, for **reimbursement** out of the proceeds of any settlement or judgment of the amount expended by the Plan for medical treatment rendered to the minor children.

9. On October 26, 1992, **judgment was** rendered against BIC and in favor of American as guardian for the Balthis children for actual and punitive damages. American recovered on the grounds of products liability, and the trial court specifically determined an absence of negligence on the part of BIC. See American Nat'l Bank & Trust Co. of Sapulpa v.

BIC Corp., 880 P.2d 420 (Okla. Ct. App. 1993). After remittitur ordered by the appellate court, BIC paid in excess of \$19 million in satisfaction of the judgment.

10. On January 1, 1993, the Plan provision regarding recoupment was amended. The 1993 Plan amendment provided that it was retroactively effective as of August 1, 1987, the date of the inception of the Plan. The 1993 amendment included a provision under which the Plan could recoup from Plan beneficiaries any money received from a third party tortfeasor or wrongdoer who was responsible for injuries sustained by Plan beneficiaries under any theory of law or equity and for which the Plan had paid benefits, together with all costs (including attorney's fees) incurred by the Plan in asserting and protecting its right of recoupment, and requiring that any such funds received by a beneficiary be held in trust for the Plan until paid over in satisfaction of the Plan's right of recoupment.

11. Contemporaneous with the payment of the judgment by BIC Corporation, \$570,368.75 was placed into escrow pending a determination of MSA's right to the funds paid by the Plan for medical expenses of the minor children.

12. Since the inception of the Plan, it has included a provision entitled "Right of Recovery", which provides:

Whenever payments have been made by the Administrator for Covered Services in excess of the maximum amount of payment necessary at that time to satisfy the intent of this provision, irrespective of to whom paid, the Administrator shall have the right to recover the excess from among the following, as the Administrator shall determine any person, to or for whom such payments were made, any insurance company, or any other organization . . .

13. The January 1, 1993 amendment includes language that requires the guardian to pay costs of future medical expenses of the minor children from the proceeds of the tort judgment, before seeking further benefits from the Plan, until the amount of those expenses equals the amount of the guardian's judgment, less that amount paid the Plan under its recoupment provision.

14. The January 1, 1993 amendment contained language providing that the Plan is entitled to recover its attorneys fees and costs in enforcing its right of recoupment, as well as interest on the funds received by a Plan beneficiary, but not paid to the Plan, at 18% per annum.

15. The Plan, from its inception in 1987, has contained provisions which allow amendment or modification of the Plan, but did not have any provision which allowed or disallowed a Plan amendment or modification to be given retroactive effect.

In support of their joint statement of stipulated facts, the Parties submitted the following for the Court's consideration: the Original Plan adopted August 1, 1987 (including the Administrative Services Agreement), the 1988 Amendment, and the 1993 Amendment.

### III.

Because the parties have stipulated as to the material facts, the only issue remaining for the Court is to determine which party is entitled to judgment as a matter of law. The parties acknowledge that the Plan did not provide a right of recoupment at the time of the Balthis children's accident, such that the Plan would be permitted to recoup benefits paid to the children in the event of a subsequent judgment. Plaintiff argues that the amendment does not operate to deprive the children of any benefits. Instead, it only provides for a right of recoupment in the event beneficiaries receive a judgment from a third party tortfeasor that caused the injuries. Alternately, Plaintiff argues that it is entitled to reimbursement under equitable principles.

On the other hand, Defendants assert that Plaintiff is applying the amendment retroactively -- and therefore unlawfully -- because the injuries had occurred and the Plan had paid certain of the children's medical expenses (\$525,987.64), prior to the enactment of the amendment. Defendants assert that only expenses incurred and paid after January 1, 1993 should be subject to the Plan's right of recoupment.<sup>2</sup>

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<sup>2</sup> Defendants do not argue that the January 1, 1993 amendment was not made according to the terms of the Plan and in writing. Thus, they effectively admit that the

The Court's decision turns on whether this amendment, which allows the Plan to recoup from Plan beneficiaries any money received from a third party tortfeasor who was responsible for injuries sustained by Plan beneficiaries and for which the Plan had paid benefits, may be applied retroactively under the circumstances presented by this case.<sup>3</sup>

The general rule is that an amendment to an ERISA plan may not operate retroactively, if that amendment deprives plan participants of a benefit to which they would otherwise be entitled. Dyce v. Salaried Employees' Pension Plan of Allied Corp., 15 F.3d 163, 166 (11th Cir. 1994); accord Wheeler v. Dynamic Eng'g. Inc., 62 F.3d 634, 640 (4th Cir. 1995) (plan amendment adopted after plaintiff began multi-step chemotherapy treatment for Stage IV breast cancer would not operate to deny plaintiff coverage to which she was otherwise entitled to under unamended

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amendment was otherwise lawful and that, therefore, it may be applied prospectively. Plaintiff is entitled to recoup funds in the amount of \$49,505.92 (medical benefits paid by the Plan on behalf of the Balthis children from January 1, 1993 to September 15, 1995).

Further, the January 1, 1993 amendment states that:

[i]n the event that any such settlement, award, judgment or payment received by a Covered Person resulted, in whole or in part, from a claim or allegation that such Covered Person would incur future medical expenses from any injury, illness or condition for which the Plan has paid Benefits, the Plan shall have no further obligation to pay any Benefits for such injury, illness or condition from the date of receipt of such settlement, award, judgment or payment until the sum of all eligible expenses paid as the result of such injury, illness or condition from and after the date of receipt of such settlement, award, judgment or payment remaining after first deducting all funds paid to the Plan pursuant to its right of recoupment and all costs of recovering such payment incurred by the Covered Person, (including without limitation attorneys' fees actually earned under the terms of a contract of employment with the attorney for the Covered Person).

Therefore, because the judgment received by the children resulted in part from an allegation that they would incur future medical expenses, the Plan does not need to pay any further future medical expenses incurred by the children unless and until the proceeds of the judgment have been exhausted. The Court notes that the children received a general verdict in the product liability lawsuit and, thus, it is impossible for this Court to establish what amount, if any, was intended to be designated for future medical expenses.

<sup>3</sup> Neither Plaintiff nor Defendants have identified any controlling Tenth Circuit authority. Therefore, the Court, in its exercise of federal question jurisdiction, will look to other federal courts to assist it in resolving this issue.

plan); Confer v. Custom Eng'g Co., 952 F.2d 41, 43 (3d Cir. 1991) (affirming district court's determination that medical expenses stemming from Plaintiff's injuries in motorcycle accident were covered by ERISA plan where written amendment to plan executed after Plaintiff's accident with an effective date prior to Plaintiff's accident purporting to exclude coverage for motorcycle accidents would have deprived Plaintiff of a benefit to which he was otherwise entitled); but see Vasseur v. Halliburton Co., 950 F.2d 1002, 1007 (5th Cir. 1992) ("The plan's subrogation rights depend on the provisions of the particular plan then in effect when expenses were incurred or claims were paid.").

In Dyce, appellants claimed that they were entitled to payment of early retirement benefits under an ERISA pension plan after their employer, Ignition Products Corporation ("Ignition"), merged into Unison Industries Limited Partnership ("Unison") on January 6, 1989. Although appellants continued their employment without interruption after the merger at Unison, they argued that, under the definition of "retirement" in the plan in existence on the date of the merger, the merger terminated their employment with Ignition and that, therefore, they were entitled to immediate early retirement benefits. In response, the plan pointed to an amendment executed on August 9, 1989, and made retroactively effective as of January 6, 1989, which amendment made plan participants ineligible for immediate payment of early retirement benefits as long as they were employed by Unison. 15 F.3d at 164.

Principally, appellants contended that the plan could not apply the August 9, 1989 amendment retroactively so as to deny them early retirement benefits because the effect would be to deprive them of benefits to which they would otherwise be entitled. In analyzing their claim, the court stated:

[i]n this case, the benefits to which the appellants are entitled have not been reduced or eliminated. Every participant who was eligible to retire and receive benefits before the divestiture date was still eligible for those same benefits after the merger. The timing of the receipt of benefits is entirely up to each participant, based on when she elects to retire. The appellants take the position that retirement is self-executing. To the contrary, the plain language of the Plan requires that a participant "elect to retire." Prior to the merger

a participant could have elected to retire and immediately begun to receive early retirement benefits. After the merger and the effective date of the amendment, the same choice was available to each appellant.

Dyce, 15 F.3d at 165-66; accord Pratt v. Petroleum Prod. Mgmt., Inc. Employee Savs. Plan & Trust, 920 F.2d 651, 660 (10th Cir. 1990) (amendments to pension plan allowing interim valuation of employee's vested interest in employer contribution account may not be retroactively applied as they would deny benefits to employee to which he was otherwise entitled). The Dyce court held that, "[i]n this case, retroactive application of the § 23 amendment does not deprive participants of a benefit to which they would otherwise be entitled. Therefore, we conclude that the amendment was properly applied retroactively to January 6, 1989." Id. at 166; cf. Confer, 952 F.2d at 42-43 (applying amendment excluding motorcycle accidents from plan coverage retroactively would deny plaintiff benefits to which he was otherwise entitled).<sup>4</sup> Unlike the

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<sup>4</sup> Defendants believe that Bartlett v. Martin Marietta Operations Support, Inc. Life Ins. Plan, 38 F.3d 514, 517 (10th Cir. 1994), which stands for the proposition that "[s]ubsequent modifications to the plan, through the drafting of the summary plan description, do not effect the terms of the written plan in existence when the plaintiff's claim arose," supports their claim that any retroactive amendment to a plan is unenforceable. However, while the Bartlett court refused to include language published and distributed after the death of Plaintiff in its interpretation of the terms of the plan at the time of Plaintiff's death, the plan administrator in Bartlett did not purport to give the additional language retroactive effect. Thus, the question of whether a certain amendment may operate retroactively was not before the Bartlett court.

Further, the facts of Bartlett are distinguishable from the instant case. First, although Bartlett discusses an employee welfare benefit plan, the subject matter of the lawsuit is proceeds of a life insurance policy. General insurance law provides that "a beneficiary's right to insurance proceeds vests on the date of the insured's death." Filipowicz v. American Stores Benefit Plans Committee, 56 F.3d 807, 815 (7th Cir. 1995). Therefore, the retroactive application of a modification in the plan which would deprive the beneficiary of her right to proceeds after the proceeds have vested would, by definition, deprive the beneficiary of benefits to which she was otherwise entitled. Cf. Williams v. Cordis Corp., 30 F.3d 1429, 1432 (11th Cir. 1994) (a pension plan is a unilateral contract which creates a vested right in those employees who accept the offer; "[t]hus, when a vested employee is terminated, a pension plan is ordinarily required to determine benefits in accordance with the plan then in effect."). However, unlike pension plans, the benefits received pursuant to an employee welfare benefit plan generally neither vest nor accrue. Owens v. Storehouse, Inc., 984 F.2d 394, 397-98 (11th Cir. 1993). Second, in Bartlett, the additional language did not clearly add or delete a term of the plan but rather clarified the definition of which employees were eligible for benefits. Therefore, Bartlett does not control the Court's disposition of the instant case.

circumstances in Confer, where the retroactive amendment actually denied benefits to a plan beneficiary, the instant case is more akin to the analysis and reasoning of the Dyce court.

The Court agrees with Plaintiff, that upholding the application of the January 1, 1993 amendment, which provides for a right of recoupment, would not deprive the Balthis children of any benefits to which they were otherwise entitled. Under the heading entitled "Benefits To Which Subscribers Are Entitled", the Plan provides that "[t]he liability of the Plan is limited to the Benefits for Covered Services specified in this Contract." Plan at 45, § GP, ¶ B(1). The Plan defines "Benefits" as "the payment, reimbursement, and indemnification of any kind which a Subscriber will receive from and through the Plan." Plan at 3, § DE, ¶ 2. Therefore, under the Plan, the children were entitled to receive payment or reimbursement for certain medical services specified in the Contract. It is undisputed that the children received those Benefits. Rather than depriving the children of the payment or reimbursement received for those covered services, the January 1, 1993 amendment allows the Plan to recover the amount of money paid for those benefits out of the proceeds of a tort judgment recovered by the children. Accord Electro-Mechanical Corp. v. Ogan, 9 F.3d 445, 447 (6th Cir. 1993) (affirming, on other grounds, district court decision requiring beneficiary to reimburse plan from proceeds of medical malpractice settlement pursuant to a subrogation clause which was given effect retroactively). The amendment prevents the Balthis children from recovering twice for the cost of their medical expenses. Further, if the children had not recovered a tort judgment against the party responsible for their injuries, the Plan would have had no right to recoup its payment of Benefits under the Plan. Thus, unlike the amendment considered by the Confer court, which denied coverage to a plan beneficiary for injuries received in a motorcycle accident subsequent to the occurrence of the

accident, this amendment does not deprive the children of any benefits to which they are otherwise entitled under the Plan.<sup>5</sup>

The January 1, 1993 amendment further provides that the Plan may recoup all costs incurred in asserting and protecting its right of recoupment including without limitation reasonable attorneys' fees. Therefore, Plaintiff is directed to submit to the Court a detailed accounting of its costs and attorneys' fees incurred so that the Court may determine how much Plaintiff is entitled to recover under this provision.

#### IV.

Finally, Defendants assert that, if Plaintiff is entitled to recoup any portion of the escrowed amount, then Defendants are entitled to recover their attorneys' fees first from that amount pursuant to their Contract with the American National Bank and Trust Company of Sapulpa as Guardian of William Brooks Balthis, Debra Leanne Balthis and David Balthis. The court-approved Contract provides that, as their fee for prosecuting the action against BIC, E. Terrill Corley, Thomas F. Ganem, Steve Clark, and Brad Williams, the attorneys, "shall have and receive FIFTY PERCENT (50%) of all amounts collected from said claim after deduction of case expenses." The escrowed funds are simply a portion of the judgment collected and received as a result of their successful prosecution of the claim against BIC pursuant to the Contract.

Plaintiff has not presented the Court with any authority enabling it to change the provisions of the Contract. Clearly, the attorneys are entitled to their fee consisting of fifty percent of the entire judgment amount prior to any recoupment of the funds by Plaintiff. Indeed, if the attorneys had been unsuccessful in prosecuting the state court lawsuit, Plaintiff would not

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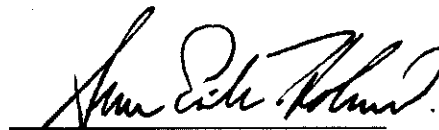
<sup>5</sup> Because the Court holds that the right of recoupment amendment may be applied here under the specific and limited circumstances of this case, where the application of such an amendment does not deprive a beneficiary of benefits which he or she would otherwise receive, it is unnecessary for the Court to address Plaintiff's second argument, that it is entitled to restitution under an equitable theory.

receive any recoupment whatsoever. To the extent that the payment of the attorneys' fees decreases the escrowed amount available for recoupment, Plaintiff will be entitled to recoupment from the portion of the judgment not currently held in escrow.

In conclusion, the Court grants Plaintiff's Motion for Summary Judgment (Docket # 6). The Court denies Defendants' Motion for Summary Judgment (Docket # 7). Finally, the Court dismisses the remaining Defendant, Walter M. Jones, from the lawsuit.

IT IS SO ORDERED.

This 2<sup>nd</sup> day of April, 1996.

A handwritten signature in black ink, appearing to read "Sven Erik Holmes", written over a horizontal line.

Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JOANNA SIMPSON,

Plaintiff,

v.

JESSE BROWN, Secretary of the  
Veterans Administration,

Defendant.

Case No. 95-CV-805-HV

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a **settlement** agreement, it is hereby ordered that the Clerk administratively terminate this action in **his records**, without prejudice to the rights of the parties to reopen the proceedings for good cause **shown** for the entry of any stipulation or order, or for any other purpose required to obtain a **final determination** of the litigation.

If, by May 1, 1996, the Parties **have not** reopened for the purpose of obtaining a final determination herein, this action shall be **deemed dismissed** with prejudice.

IT IS SO ORDERED.

This 1<sup>st</sup> day of APRIL, 1996.

  
Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 2 1996

Phil Lombardi  
U.S. DISTRICT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-CV-176-H

STELLA ROSE BROWN,

Plaintiff,

v.

CUMMINS MATERIALS, INC., an  
Oklahoma corporation,

Defendant.

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a **settlement** agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a **final determination** of the litigation.

If, by May 1, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be **deemed dismissed** with prejudice.

IT IS SO ORDERED.

This 15<sup>th</sup> day of APRIL, 1996.



Sven Erik Holmes  
United States District Judge



Defendant, CITY OF BIXBY, Oklahoma, **was** served a copy of Summons and Complaint on October 20, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on November 3, 1995; the Defendant, CITY OF BIXBY, Oklahoma, filed its Disclaimer on December 5, 1995; and that the Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, have failed to **answer** and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, were granted a **Divorce** in Case No. FD 90-7409, on April 30, 1991, and filed in Tulsa County District Court on August 5, 1991. The Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, **are** both single unmarried persons.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Twenty-seven (27), Block Four (4),  
SOUTHWOOD EAST, and addition to the town of  
Bixby, Tulsa County, State of Oklahoma, according to  
the recorded Plat thereof.**

The Court further finds that on June 13, 1979, Charles E. Markham and Terry G. Markham, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC., their mortgage note in the amount of **\$57,050.00**, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds ~~that as~~ security for the payment of the above-described note, Charles E. Markham and Terry G. Markham, Husband and Wife, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC., a mortgage dated June 13, 1979, covering the above-described ~~property~~. Said mortgage was recorded on June 18, 1979, in Book 4407, Page 517, in the records of Tulsa County, Oklahoma.

The Court further finds ~~that on~~ June 18, 1979, TURNER CORPORATION OF OKLAHOMA, INC., assigned the ~~above-described~~ mortgage note and mortgage to FEDERAL NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on June 19, 1979, in Book 4407, Page 1305, in the records of Tulsa County, Oklahoma.

The Court further finds ~~that on~~ June 15, 1989, FEDERAL NATIONAL MORTGAGE ASSOCIATION, assigned ~~the~~ above-described mortgage note and mortgage to the ADMINISTRATOR OF VETERAN'S AFFAIRS of Washington, D.C., his successors and assigns. This Assignment of Mortgage ~~was~~ recorded on June 21, 1989, in Book 5190, Page 144, in the records of Tulsa County, Oklahoma.

The Court further finds ~~that on~~ October 18, 1989, SECRETARY OF VETERAN'S AFFAIRS, assigned ~~the~~ above-described mortgage note and mortgage to FEDERAL NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on October 23, 1989, in Book 5215, Page 700, in the records of Tulsa County, Oklahoma.

The Court further finds ~~that on~~ October 20, 1989, FEDERAL NATIONAL MORTGAGE ASSOCIATION, assigned ~~the~~ above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington, D.C., his

successors and assigns. This Assignment of Mortgage was recorded on October 23, 1989, in Book 5215, Page 701, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 5, 1980, Charles E. Markham and Terry G. Markham, husband and wife, granted a general warranty deed to Tom D. Cardwell and Nola E. Cardwell, husband and wife. This deed was recorded with the Tulsa County Clerk on September 15, 1980, in book 4497, Page 1037 and the Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, assumed thereafter payment of the amount due pursuant to the note and mortgage described above and are the current assumptors of the subject indebtedness.

The Court further finds that on June 1, 1989, the Defendant, TOM D. CARDWELL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 1, 1991.

The Court further finds that the Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, are indebted to the Plaintiff in the principal sum of \$91,877.27, plus interest at the rate of 10 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds ~~that the~~ Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, are in default, and have no right, title or interest in the subject real property.

The Court further finds ~~that the~~ Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds ~~that the~~ Defendant, CITY OF BIXBY, Oklahoma, Disclaims any right, title or interest in ~~the~~ subject real property.

The Court further finds ~~that~~ pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all ~~instances~~ any right to possession based upon any right of redemption) in the mortgagor or any ~~other~~ person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, in the principal sum of \$91,877.27, plus interest at the rate of 10 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums **advanced** or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, TOM D. CARDWELL, NOLA E. CARDWELL, CITY OF BIXBY, Oklahoma,

COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, TOM D. CARDWELL and NOLA E. CARDWELL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and

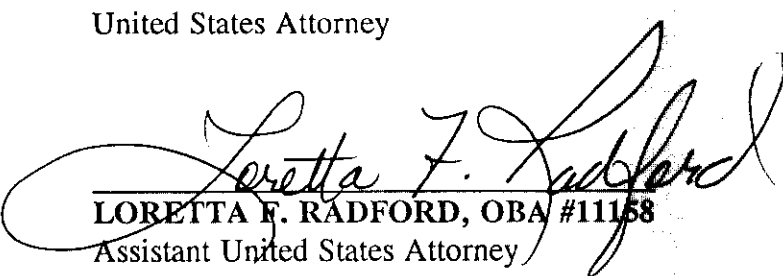
decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIC HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 1042H

LFR:flv

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

DARRYL J. WILLIAMS,

Plaintiff,

vs.

No. 95-C-971-H

TULSA POLICE DEPARTMENT, et al)


Defendants.

**ORDER**

Before the Court is the motion to dismiss of the City of Tulsa, filed on January 24, 1996. Plaintiff, a pro se litigant, has not responded although the Court granted him an extension of time.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.<sup>1</sup> Accordingly, Defendant's motion to dismiss (doc. #6) is granted and the above captioned case is **dismissed** without prejudice at this time.

SO ORDERED THIS 1<sup>st</sup> day of APRIL, 1996.

  
Sven Erik Holmes  
United States District Judge

<sup>1</sup>Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

9

ENTERED ON DOCKET

DATE 4-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

APR 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

LEO SHADE,

Plaintiff,

vs.

WEXFORD HEALTH SERVICE,  
et al.,

Defendants.

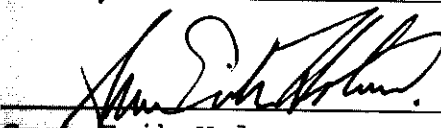
No. 96-CV-71-H

**ORDER**

On February 5, 1996, Plaintiff filed a motion for leave to proceed in forma pauperis and a civil rights complaint. On February 14, 1996, The Clerk of the Court notified Plaintiff that the USM-285 forms for service on Defendants were not signed and that he should sign were indicated as soon as possible and return them to the Court. As of the date of this order, Plaintiff has failed to submit the forms or seek an extension of time.

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis (DOCKET #1) is GRANTED and this action is hereby DISMISSED WITHOUT PREJUDICE for lack of prosecution.

SO ORDERED THIS 1st day of APRIL, 1996.

  
Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET  
DATE 4-3-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION,<sup>1/</sup> )

Plaintiff, )

v. )

No. 92-CV-1043-H ✓

LOUIS B. GRANT, JR.; CHARLES B. )  
GRANT; J. LAWRENCE MILLS, JR.; )  
KEITH G. GOLLUST; PAUL E. TIERNEY, )  
JR.; EDWARD L. JACOBY; ROD L. REPPE; )  
DONALD BERGMAN; WILLIAM BRUMBAUGH; )  
EDWARD H. HAWES; JAMES R. MALONE; )  
ROBERT B. RISS; ROBIN K. BUEREGE; and )  
W.R. HAGSTROM, )

Defendants. )

**F I L E D**

APR - 2 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**REPORT AND RECOMMENDATION**

The following motion has been referred to the undersigned Magistrate Judge for report and recommendation: "Supplement to the Motion for Summary Judgment of the Defendant Donald Bergman."<sup>2/</sup> [Doc. Nos. 124, 142]. Defendant, William M. Brumbaugh, has adopted and joined in Mr. Bergman's motion for summary judgment. [Doc. No. 181]. Having reviewed the parties' submissions and having heard oral argument on January 26, 1996, the undersigned Magistrate Judge offers the

<sup>1/</sup> Pursuant to the Resolution Trust Corporation Completion Act, 12 U.S.C. § 1441a(m)(1) and (2), the Resolution Trust Corporation ("RTC") ceased to exist after December 31, 1995. As of January 1, 1996, all assets and liabilities of the RTC were transferred to the Federal Deposit Insurance Corporation ("FDIC") as manager of the FSLIC Resolution Fund. See 12 U.S.C. § 1821a(a)(1). Therefore, pursuant to Fed. R. Civ. P. 17, 21 and 25(c), the FDIC is substituted for the RTC as the Plaintiff in this action. Any reference to the FDIC shall be treated as a reference to the RTC for the time period when the RTC was in existence.

<sup>2/</sup> Mr. Bergman filed a pleading which was designed to adopt a motion for summary judgment (doc. no. 109) filed by Defendants Hawes, Malone and Riss. [Doc. No. 124]. This pleading also reserved Mr. Bergman's right to supplement his adoption of the Hawes-Malone-Riss motion with materials of his own. Mr. Bergman later filed a supplement. [Doc. No. 142]. This supplement and its related briefing (doc. nos. 143, 144, 191 and 199) contain the arguments with which this Report and Recommendation are concerned. The undersigned has previously recommended that the Haws-Malone-Riss motion, and that portion of Mr. Bergman's pleading adopting the Hawes-Malone-Riss motion, be denied. [Doc. No. 281].

following Report and recommends that the Bergman-Brumbaugh motion for summary judgment be **DENIED**.

## **I. INTRODUCTION**

Defendants were directors of **Sooner Federal Savings and Loan Association** ("**Sooner Federal**"), a federally chartered depository institution. The Director of the Office of Thrift Supervision ("**OTS**") **declared** Sooner Federal insolvent and appointed the RTC as Sooner Federal's receiver in 1989 and conservator in 1990 to liquidate Sooner Federal's assets. One such asset to be liquidated by the RTC is any claim which Sooner Federal might have **against** its officers and/or directors. This lawsuit is an attempt by the RTC to liquidate that asset. The FDIC has since been substituted for the RTC. *See* n.1, *supra*.

With respect to the Group I Defendants,<sup>3/</sup> the FDIC has filed an "Abandonment of Claims." [Doc. No. 263]. In this "**Abandonment of Claims**," the FDIC announced its intention to abandon all claims **against** the Group I Defendants except for any claim relating in any way to **Sooner Federal's** sale-leaseback transaction with Parker North American Corporation (the "**PNA sale-leaseback transaction**"). The Court has dismissed with prejudice all claims **against** the Group I Defendants except those dealing with the PNA sale-leaseback transaction. [Doc. No. 270].

In 1988 Sooner Federal and PNA negotiated and consummated a sale-leaseback transaction. The terms of this transaction provided that Sooner Federal would sell its furniture, fixtures and equipment ("**FFE**") to PNA for \$10 million. Sooner Federal was then to lease its FFE from PNA under a five year lease with rental payments totaling \$12 million. To finance its purchase of Sooner Federal's FFE, PNA obtained a loan from First City Leasing Corporation ("**FCLC**"). This loan was guaranteed by Sooner Federal securities. PNA only paid Sooner Federal \$4 million of the \$10 million FFE purchase price. PNA defaulted on its loan payments to FCLC, and PNA eventually filed bankruptcy.<sup>4/</sup> FCLC accelerated PNA's \$10 million loan and eventually foreclosed on the Sooner Federal securities that had been pledged as collateral.

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<sup>3/</sup> The following five Defendants have been previously defined as the Group I Defendants: Donald Bergman, William Brumbaugh, Edward H. Hawes, James R. Malone, and Robert B. Riss.

<sup>4/</sup> Due to PNA's bankruptcy, the fate of its \$4 million payment to Sooner Federal has not yet been decided. The bankruptcy court found that the \$4 million payment was not an avoidable preference. However, on appeal, the district court reversed the bankruptcy court and held that the \$4 million payment was an avoidable preference. The district court's order is currently the subject of an appeal in the Ninth Circuit Court of Appeals.

The substantive details of the PNA transaction were carried out primarily by two Sooner Federal officers -- David Moffett and John Roberds, neither of whom are defendants in this case. David Moffett was a Sooner Federal vice president and Sooner Federal's Chief Financial Officer. John Roberds came to Sooner Federal on July 11, 1988. Mr. Moffett resigned from Sooner Federal on July 22, 1988 and he was replaced by Mr. Roberds. Mr. Roberds picked up the PNA transaction and carried it forward from the point at which it had been left by Mr. Moffett. Defendants argue that Mr. Moffett and Mr. Roberds entered into the PNA transaction when they were not authorized to do so under Sooner Federal policies and procedures. Defendants argue that by the time they learned about the PNA transaction the damage to Sooner Federal had been done and it was too late to do anything.

The following facts are undisputed:

1. Michael E. Parker was the President and CEO of PNA.
2. John R. Livingston was the Executive Vice President of PNA.
3. Mr. Parker and Mr. Livingston were primarily responsible for negotiating the PNA transaction with David Moffett and John Roberds.
4. On August 23, 1993, Michael E. Parker pled guilty to a federal criminal indictment charging Mr. Parker with a violation of 18 U.S.C. § 1344(1) and (2) (i.e., bank fraud).
5. On April 12, 1994, John R. Livingston pled *nolo contendere* to an Oklahoma criminal information charging Mr. Parker with attempting to obtain money from Sooner Federal by false pretenses (i.e., fraud).

(Exhibits "D," "E," "F," and "G" to Mr. Brumbaugh's motion for summary judgment). Defendants argue that a summary judgment in their favor is appropriate because no reasonable jury could conclude in the face of Mr. Livingston's and Mr. Parker's criminal conduct that Defendants' alleged negligence was the proximate cause of any damage to Sooner Federal. In particular, Defendants argue that Mr. Parker's and Mr. Livingston's criminal conduct is a "supervening cause" which breaks any causal connection between Defendants' alleged negligence and any harm to Sooner Federal.

**I. GENUINE ISSUES OF MATERIAL FACT PRECLUDE THE ENTRY OF SUMMARY JUDGMENT FOR DEFENDANTS**

A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). While conducting this analysis, the court must resolve all doubt in favor of the non-moving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980). Where issues of proximate cause are concerned, summary judgment may only be granted where there is no evidence from which a jury could reasonably find the required casual nexus between the original actor's negligence and the resulting harm. Henry v. Merck and Company, Inc., 877 F.2d 1489, 1495 (10th Cir. 1989).

**A. PLAINTIFF'S NEGLIGENCE CLAIMS**

The FDIC's negligence claims are based in part on two resolutions allegedly passed by Sooner Federal's Board of Directors -- the July 17, 1987 Global Delegation resolution and the August 26, 1988 First City Leasing Corporation ("FCLC") resolution. The FDIC argues that the Global Delegation resolution was a negligent abdication of the Board's authority and responsibility to Mr. Moffett and Mr. Roberds. The FDIC also argues that the Board was negligent in not supervising Mr. Moffett's and Mr. Roberds' exercise of the authority they were given by the Global Delegation resolution. In particular, the FDIC argues that the Board should have known that Mr. Moffett and later Mr. Roberds were selling all of Sooner Federal's furniture, fixtures and equipment and that Sooner Federal was pledging \$14-20 million worth of Sooner Federal's securities as collateral for PNA's loan from FCLC. The FDIC argues further that the Board was negligent when it approved the FCLC resolution without being sufficiently informed about the details of the PNA transaction.

**1. The Global Delegation Resolution**

On July 17, 1987, Sooner Federal's Board of Directors passed the following resolution:

[T]he president or any vice president of this association is hereby authorized, until otherwise ordered, to enter into, execute and deliver in the name and on behalf of this association any contract, agreement, conveyance or other instrument that may be deemed by such officer to be

necessary and proper for the business of the association, without further act or resolution of this Board (such officer's determination of the necessity and propriety of entering into, executing and delivering such contract, agreement, conveyance or other instrument to be conclusively evidenced by the officer's execution and delivery of the same).

(FDIC's Second Response, Excerpts from July 17, 1987 Board of Directors' meeting).<sup>5/</sup> The FDIC argues that pursuant to this broadly worded resolution, the Board delegated too much authority to Sooner Federal's executive officers and negligently abdicated its duty to oversee the activities of Sooner Federal's executive officers, especially on a large transaction like the PNA transaction.

## **2. The FCLC Resolution**

The FDIC argues that FCLC submitted a proposed resolution which it wanted Sooner Federal's Board to pass, presumably because FCLC did not feel comfortable relying on the representations of Mr. Moffett and/or Mr. Roberds. The FDIC alleges that Sooner Federal's Board adopted the following resolution at its August 1988 board meeting:

RESOLVED, that this association grant to or for the benefit of First City Leasing Corporation, a Delaware corporation ("FCLC"), a lien upon and/or a security interest upon such assets of this association as may be agreed between any of said officers and FCLC as security for (i) this association's obligation under that certain Lease Agreement dated July 7, 1988, between this association, as lessee, and Parker North American Corporation, a Delaware corporation ("Lessor"), as lessor, and (ii) Lessor's indebtedness, obligations and liabilities to FCLC pursuant to that certain Security Agreement dated August 11, 1988, by Lessor in favor of FCLC, and that any of said officers is authorized to execute and deliver for and on behalf of this association, pledge of collateral and trust agreements, security agreements and such other instruments as may be desired or required by FCLC in connection with such grant

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<sup>5/</sup> The exhibits attached to the FDIC's Second Response to the Hawes-Malone-Riss motion [Doc. No. 177] are unlabeled. The Court will, therefore, only be able to make general reference to the materials attached to the FDIC's Second Response.

of a lien and/or security interest and containing such terms and conditions as may be acceptable or agreeable to any of said officers, such acceptance and agreement to be conclusively evidenced by any of said officers' execution and delivery thereof.

(FDIC's Second Response, Excerpts from August 26, 1988 Board of Directors' meeting). The FDIC argues that prior to passing this resolution, the Board should have informed itself about the particulars of the PNA transaction. The FDIC argues that if the Board had informed itself, it would have discovered at the very least that no legal opinion had in fact been rendered on the transaction, no credit check of PNA had been performed, and the FHLBB had not been notified. The FDIC argues that a reasonable jury could conclude that the Board's passage of the FCLC resolution at a time when it was not fully informed about the PNA transaction was negligent.

**B. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER MR. PARKER'S AND MR. LIVINGSTON'S CRIMINAL CONDUCT IS A SUPERVENING CAUSE.**

Under certain circumstances, a third party's intervening criminal act may break the chain of causation which leads from the original actor's negligence to the plaintiff's injury. When this occurs, the third party's intervening act is deemed a "supervening" cause and the original actor is relieved of liability for his negligence. See Henry, 877 F.2d at 1495; Minor v. Zidell Trust, 618 P.2d 392, 394 (Okla. 1980); and Restatement (Second) Torts § 448.<sup>6/</sup>

**1. Was the criminal conduct an "intervening" cause?**

The Court finds that there is a genuine issue of material fact as to whether Mr. Parker's and Mr. Livingston's criminal conduct was in fact an "intervening" act with respect to the FCLC resolution.<sup>7/</sup> To be an intervening act Mr. Parker's and Mr. Livingston's criminal conduct must have occurred between the Board's original negligent act (i.e., passage of the FCLC resolution) and the harm, if any, caused by the passage of the FCLC resolution. The evidentiary materials of record do not conclusively establish that Mr. Parker's and Mr. Livingston's criminal conduct was intervening in this sense. In fact, a reasonable inference could be drawn that most,

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<sup>6/</sup> The undersigned has previously recommended that Defendants may be sued for ordinary negligence under Oklahoma law. [Doc. No. 281].

<sup>7/</sup> Mr. Parker's and Mr. Livingston's criminal conduct is clearly "intervening" with regard to the Board's alleged negligent passage of the Global Delegation resolution.

if not all, of the Mr. Parker's and Mr. Livingston's wrongful conduct occurred prior to the Board's passage of the FCLC resolution.

To flesh out the details of the criminal conduct at issue in this case, Defendants attach (1) a federal criminal indictment relating to Mr. Parker, (2) an Oklahoma criminal information relating to Mr. Livingston, and (3) the pleas entered by Mr. Parker and Mr. Livingston. (Exhibits "D," "E," "F," and "G" to Mr. Brumbaugh's motion for summary judgment). Mr. Livingston plead *nolo contendere* to the allegations in the information filed against him. Mr. Livingston's *nolo contendere* plea and the facts recited in the information relating to Mr. Livingston are of low evidentiary value and are generally not admissible. See Fed. R. Evid. 803(22) and M. Graham, Federal Practice and Procedure: Evidence § 6773 (1992, Interim Edition). Thus, they do not assist the Court in determining precisely when Mr. Livingston's criminal conduct occurred.

Mr. Parker plead guilty to Count Two of the Indictment filed against him. Count Two alleged that Mr. Parker violated 18 U.S.C. § 1344(1) and (2) by executing a scheme and artifice to obtain by false pretenses "monies, funds, credits, assets, securities and other property owned by, or under the custody or control of, Sooner Federal. . . ." (Exhibit "D" to Mr. Brumbaugh's motion for summary judgment). To establish the crime of fraud under 18 U.S.C. § 1344, the financial institution at issue need not suffer an actual financial loss. It is only necessary to prove that the fraudulent scheme or artifice placed the financial institution at risk. See U.S. v. Lemons, 941 F.2d 309, 316 n.3 (5th Cir. 1991) (citing several cases).

The evidentiary materials establish that by the time the FCLC resolution was passed by Sooner Federal's Board of Directors, Mr. Parker and Mr. Livingston had already managed to obtain (1) an executed bill of sale and an assignment from Sooner Federal's officers, and (2) the \$9.2 million proceeds from FCLC. The Court finds that a reasonable jury could conclude that Mr. Parker's and Mr. Livingston's crimes were completed prior to the Board's passage of the FCLC resolution. If Mr. Parker's and Mr. Livingston's criminal activity did occur prior to the passage of the FCLC resolution, then their criminal activity would, under the FDIC's theory of the case, have been just one of several other things which the Board might have discovered had it conducted a proper investigation of the PNA transaction prior to approving the FCLC resolution. Whether the Board would or would not have discovered the criminal activity also presents factual issues which the Court cannot resolve on a summary judgment motion.

## 2. Was the criminal conduct a "supervening" cause?

Under Oklahoma law, an intervening cause is transformed into a "supervening" cause if the intervening cause is "(1) independent of the original act, (2) adequate of itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable." Henry, 877 F.2d at 1495 (citing several Oklahoma cases). Even if Mr. Parker's and Mr. Livingston's criminal conduct is an intervening cause, the Court is persuaded that a reasonable jury, given an instruction stating the rule above, could conclude that Mr. Parker's and Mr. Livingston's criminal conduct is not a "supervening" cause.

Defendants do not seriously dispute the fact that as directors of a financial institution they had a duty to oversee the conduct of Sooner Federal's business and to review and approve major transactions. It is not unreasonable to conclude that at least one of the reasons why directors are required to review and approve major transactions is a hope that they will bring to bear their collective experience and prevent the financial institution from entering into transaction which might be infected by fraud.<sup>8/</sup> The fraud may or may not be detected by the directors, but that does not relieve the directors from conducting an appropriate review.

Section 449 of the Restatement (Second) of Torts provides as follows:

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Restatement (Second) Torts § 449. The Board's duty to review major transactions is imposed in part to protect Sooner Federal from entering into transactions which might be infected by fraud. Under the above-quoted rule, therefore, Defendants cannot argue that even though they did not conduct an appropriate review of the PNA transaction, they cannot be liable because Sooner Federal was victimized by fraud -- an intentionally criminal act. To deny recovery because Sooner Federal was harmed as a result of being exposed to the very risk from which it was the purpose of the Board's duty to protect Sooner Federal would be to make the Board's duty a nullity. Id. at comment b. See also Restatement (Second) of Torts §§ 442A and

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<sup>8/</sup> Other reasons include, but are not limited to, the following: (1) to insure that the transaction complies with the law and applicable regulations; and (2) to insure that the transaction is consistent with the institution's plans and objectives.

442B. It is up to the jury to **determine**, however, whether Defendants' proper oversight and appropriate review of the PNA transaction would have prevented the harm under the facts of this case.

Section 443 of the Restatement (Second) of Torts further provides as follows:

The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.

Restatement (Second) Torts § 443.

The word "normal" is not used in this Section in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary. It means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard the intervention as so extraordinary as to fall outside of the class of normal events.

Id. at comment b. The Court finds that a reasonable jury could find that Mr. Parker's and Mr. Livingston's criminal activity was, in light of the Board's alleged failure to oversee and review the PNA transaction, not "so extraordinary as to fall outside of the class of normal events."

### 3. Other factual issues.

The undersigned has also previously determined that other factual issues exist in connection with the Global Delegation and FCLC Resolutions. See Report and Recommendation, Doc. No. 281, pp. 29-34.

### CONCLUSION

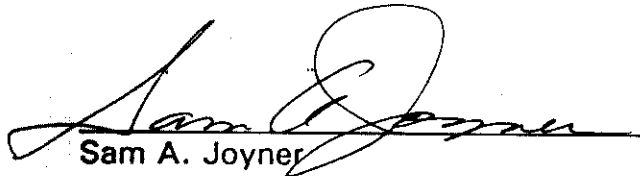
Because the Court has determined that there are genuine issues of material fact regarding whether Michael E. Parker's and John R. Livingston's criminal conduct is an "intervening" or a "supervening" cause in this case, the undersigned recommends that Defendants' motions for summary judgment [Doc. Nos. 124, 142, 181] be **DENIED**.

**TIME FOR OBJECTIONS**

If the parties so desire, they may file with the District Judge assigned to this case, within 10 days from the date they are served with a copy of this Report and Recommendation, objections to the undersigned's recommended disposition of this action. See 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b).

IT IS SO ORDERED.

Dated this 2 day of April 1996.

  
Sam A. Joyner  
United States Magistrate Judge

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

APR 01 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRYAN E. ENGLER,

Plaintiff,

vs.

Case No. 96-CV-0061-BU-✓

DILLARD DEPARTMENT STORES,  
INC.,

Defendant.

ENTERED ON DOCKET

DATE APR 02 1996

JOINT STIPULATION OF DISMISSAL

Plaintiff, Bryan E. Engler and Defendant, Dillard Department Stores, Inc., pursuant to Federal Rule of Civil Procedure 41, hereby stipulate as to the dismissal with prejudice of this action, with each party to bear its own costs and attorneys fees. Both parties jointly request that the Court enter an order dismissing this case with prejudice. A proposed order has been submitted herewith.

DOERNER, SAUNDERS, DANIEL & ANDERSON

By:

Richard H. Foster  
Richard H. Foster, OBA No. 3055  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

Attorneys for Defendant  
Dillard Department Stores, Inc.

FARRAR & FARRAR, P.C.

By:

Greg A. Farrar  
Greg A. Farrar, OBA No. 2832  
717 South Houston  
Suite 502  
Tulsa, Oklahoma 74127  
(918) 587-7441

Attorneys for Plaintiff  
Bryan E. Engler

ENTERED ON DOCKET  
DATE 4-2-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

APR 1 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MAMORU KAWADA, Individually,  
and MAMORU KAWADA, as  
Shareholder of Nanci  
INTERNATIONAL JAPAN,  
a Japanese corporation,

PLAINTIFF,

vs.

CASE NO. 95-C-108-H ✓

ELIAS MASSO, Individually,  
and as President of Nanci  
CORPORATION INTERNATIONAL;  
Nanci MASSO, Individually and  
as Chairman of Nanci  
INTERNATIONAL JAPAN; and  
Nanci CORPORATION  
INTERNATIONAL, an Oklahoma  
corporation,

DEFENDANTS.

**REPORT AND RECOMMENDATION**

Before the Court for Report and Recommendation is the Defendants' MOTION TO DISMISS the Complaint pursuant to Fed. R. Civ. P. 12(b)(1), (6) and (7) [Dkt. 5]. The defendants seek to dismiss the Amended Complaint for lack of subject matter jurisdiction for Plaintiff's failure to include an indispensable party pursuant to Rule 19 who, if joined, would deprive the court of diversity of citizenship jurisdiction. The individual defendants, Mr. and Mrs. Masso, further seek dismissal of the causes of action against them for failure to state a claim upon which relief can be granted.

Mr. and Mrs. Masso are the sole owners of Nanci Corporation International (NI), which is an Oklahoma corporation involved in the business of selling health and nutrition products. Mr.

29

SSO, according to the amended complaint are citizens of the State of Oklahoma. In  
Masso and NI, along with Plaintiff Kawada, established a subsidiary  
the products of NI in Japan. NI owns 80% of the  
In addition to contributing

and Mrs. Masso, according to the amended complaint are citizens of the State of Oklahoma. In May 1992, Mr. and Mrs. Masso and NI, along with Plaintiff Kawada, established a subsidiary of NI, Nanci International Japan (NIJ) to sell the products of NI in Japan. NI owns 80% of the stock of NIJ and Plaintiff Kawada owns 20% of the stock of NIJ. In addition to contributing capital to NIJ, Plaintiff Kawada lent NIJ approximately \$300,000 and agreed to serve as President of NIJ. The Board of Directors of NIJ consists of Mr. and Mrs. Masso and Plaintiff Kawada.

Plaintiff Kawada, in his Amended Complaint, alleges that a portion of his loan to NIJ has not been repaid, that he has not been compensated for his services to NIJ, that Mr. and Mrs. Masso and NI fraudulently induced him to enter into a settlement agreement of the debts owed to him by NIJ which settlement agreement Mr. and Mrs. Masso and NI have failed to fulfill. Finally, Plaintiff Kawada seeks an accounting from Mr. and Mrs. Masso and NI regarding their activities with respect to NIJ.

Defendants seek dismissal of Plaintiff's Amended Complaint asserting that Plaintiff has failed to join an indispensable party, NIJ, which party should be joined under Rule 19(a) but cannot be joined as the joinder of NIJ would destroy the complete diversity of citizenship between the parties. The parties do not seriously contest that NIJ is a party that should be joined under Rule 19(a) if possible without destroying jurisdiction. The Court finds NIJ to be such a party.

Once the court has determined that a party should be joined under Rule 19(a), the court must consider the four factors set forth in 19(b) to determine whether in equity and good conscience the action should proceed among the parties before the court or should be dismissed. The factors to be considered by the court include:

First, to what extent a judgment rendered in the person's absence might be

prejudicial to the person or those already parties;

Second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

Third, whether a judgment rendered in the person's absence will be adequate;

Fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In general, federal courts are extremely reluctant to grant motions to dismiss based upon nonjoinder. Dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result. *Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d* § 1609, at page 104 (1986). Where a plaintiff can otherwise maintain a diversity action in the federal courts, the plaintiff has an interest in the forum granted by federal law and chosen by him. To outweigh the plaintiff's choice, some additional interest of the absent person, the other parties or the judicial system must be found. *Pasco Int'l v. Stenograph Corp.*, 637 F.2d 496 (7th Cir. 1980). In applying the four factors set forth in Rule 19(b) the court should be guided by pragmatic considerations. *Advisory Committee Notes 1966 Amendment*.

On a superficial level the transactions at issue in the Amended Complaint may seem to primarily involve Plaintiff Kawada and NIJ. However, when viewed from the required pragmatic perspective and when the Amended Complaint is considered as a whole, it is clear that the dispute is primarily between Plaintiff Kawada and Defendants Mr. and Mrs. Masso and NI. Mr. and Mrs. Masso caused NI to form or establish NIJ with Plaintiff Kawada in an attempt to expand the business of NI into the country of Japan. Plaintiff Kawada and Mr. and Mrs. Masso, through NI, own 100% of NIJ. Further, Plaintiff Kawada and Mr. and Mrs. Masso comprise the entire Board of Directors of NIJ. Thus, all of the actors in these transactions are currently before the Court

with the lone exception of the legal entity, NIJ, which acted, and could only act, through the actions and at the direction of Mr. and Mrs. Masso and Plaintiff Kawada. It is from this pragmatic perspective that the Court will analyze the four factors set forth in Rule 19(b).

#### **FACTOR ONE, PREJUDICE TO NIJ OR THE DEFENDANTS**

With regard to prejudice to NIJ, the Court finds that the money judgment sought against the current defendants by Plaintiff Kawada would in no way prejudice NIJ. Further, while there may be some preclusive effect on NIJ, based upon the judgment in this case, the Court is confident that the interest of NIJ will be adequately asserted by Mr. and Mrs. Masso, who constitute a majority of the Board of Directors of NIJ and who also are the majority stockholders in NIJ via NI. Also, Plaintiff's demand that the defendants produce various records concerning NIJ and provide an accounting of their activities with regard to NIJ does not prejudice NIJ.

The current defendants have failed to articulate any specific prejudice they would suffer due to the absence of NIJ. Although Defendants claimed prejudice during oral argument stemming from Plaintiff's assertions that NIJ was simply the alter ego of the defendants, this allegation cannot serve as prejudice to the defendants because it would necessarily be their own conduct which would cause NIJ to be found to be the alter ego of the defendants and thus they are precisely the parties best suited to defend that allegation.

Moreover, to the extent that there may be any prejudice to NIJ or the defendants, this prejudice can be easily cured by NIJ intervening in this action under Rule 24, or by the defendants impleading NIJ under Rule 14.<sup>1</sup>

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<sup>1</sup> The Plaintiff will have to confront the potential problems created by 28 U.S.C. § 1367 in the event of such intervention or impleading.

As stated in *Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d* § 1608 (1986) at page 112:

According to the discussion of this second factor in the Advisory Committee Note accompanying the 1966 amendment of Rule 19, the absent persons or those who already are parties should be encouraged to take steps to avoid the possibility of prejudice. Thus, a defendant faced with the prospect of multiple actions may be in a position to bring in absent persons who could not be joined as original parties by means of defensive interpleader, or by using impleader or asserting a counterclaim under Rule 13(h) that falls within the ancillary jurisdiction of the court. In short, the Rule 19(b) notion of equity and good conscience contemplates that the parties actually before the court are obliged to pursue any avenues for eliminating the threat of prejudice.

The absent person, who should be informed under Rule 19(c) that the action is pending as suggested by the Advisory Committee, also may protect his interest by voluntarily appearing in the action, or intervening on an ancillary basis. (footnotes omitted)

In *Pasco*, 637 F.2d at 496 n.20, the Seventh Circuit reviewed the trial court's dismissal of the Complaint under 19(b). The Circuit Court found that the District Court erred in its dismissal of the Complaint and pronounced that all persons subject to impleader by the Defendant are dispensable parties. See also *Associated Dry Goods v. Towers Financial Corp.*, 920 F.2d 1121, 1124 (2nd Cir. 1990); *Park v. Didden*, 695 F.2d 626, 632 (D.C. Cir. 1982).

#### **FACTOR TWO, PROTECTIVE PROVISIONS IN THE JUDGMENT**

As noted above, both NIJ and the defendants are fully capable of protecting their interests through intervention or impleading.

### **FACTOR THREE, ADEQUACY OF JUDGMENT**

Because the plaintiff is seeking only a money judgment against the current defendants and an accounting of their activities with NIJ, the Court is confident that the judgment to be rendered, if Plaintiff is successful, will be adequate.

### **FACTOR FOUR, WHETHER PLAINTIFF WILL HAVE AN ADEQUATE REMEDY IF ACTION IS DISMISSED FOR NONJOINER**

Although Plaintiff asserts that there is a serious question of the availability of an alternative forum for this litigation, including NIJ, this Court is persuaded otherwise. The state courts of Oklahoma would appear to be an appropriate forum for all of the current defendants and NIJ. Despite Plaintiff's assertion that NIJ may claim a lack of minimum contacts with Oklahoma, the original agreement entered into by NIJ, NI and Plaintiff Kawada contained a forum selection clause specifically identifying Oklahoma law and Oklahoma as a proper forum for litigation concerning the agreement. Additionally, Plaintiff's Amended Complaint sets forth numerous transactions between NI, an Oklahoma corporation, and NIJ from 1992 through 1994, regarding the subject matter of this litigation which would likewise confer jurisdiction on the state courts of Oklahoma.

Despite the finding that an alternative forum exists, this Court does not view that factor as sufficient to outweigh the plaintiff's interest in the forum granted to him by federal law and chosen by him.

### **JOINER OF NIJ AS A DEFENDANT IN DERIVATIVE ACTION**

The defendants assert that NIJ must be joined as a defendant because of the alleged derivative nature of Plaintiff's fifth cause of action. Although there certainly are allegations

contained within Plaintiff's fifth cause of action that could be construed as derivative in nature, the only relief demanded in the fifth cause of action is an accounting. Thus the Court construes Plaintiff's fifth cause of action as a direct cause of action and not a derivative cause of action. As stated in *Wright, Miller & Kane, Federal Practice and Procedure*: Civil 2d § 1821 (1986) p. 6:

An action that is not for the benefit of the corporation but merely seeks to enforce the rights of one or more shareholders against the corporation is not a derivative action.

The Court therefore finds this argument by Defendants to be unpersuasive.

#### **PLAINTIFF'S CLAIMS AGAINST MR. AND MRS. MASSO**

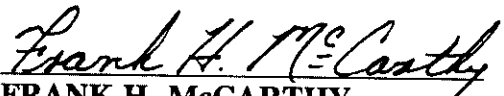
Defendants, Mr. and Mrs. Masso, contend Plaintiff's Amended Complaint fails to state a claim against them in their individual capacity. Plaintiff responds that the Amended Complaint states claims against Mr. and Mrs. Masso as personally liable on the settlement agreement as well as claims for fraud and unjust enrichment. For purposes of deciding Defendant's Motion To Dismiss under Rule 12(b)(6), the Complaint is construed in the light most favorable to Plaintiff and its allegations are taken as true. The Court must simply decide if the allegations are sufficient under Rule 8(a). *Wright, Miller & Kane, Federal Practice and Procedure*: Civil 2d § 1357 at page 304 (1986). A motion to dismiss should not be granted unless it appears beyond doubt that the Plaintiff could prove no set of facts which would entitle him to relief. *Huxall v. First State Bank*, 842 F.2d 249 (10th Cir. 1988).

With these principles in mind, a review of Plaintiff's Amended Complaint discloses that Plaintiff has stated a claim against Mr. and Mrs. Masso and that the motion of Mr. and Mrs. Masso to dismiss under 12(b)(6) should be denied.

It is therefore the Recommendation of the undersigned United States Magistrate Judge that Defendants' MOTION To DISMISS [Dkt. 5] be DENIED.

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the District Court based upon the findings and recommendations of the United States Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 1<sup>ST</sup> day of APRIL, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 1 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CHARLES F. MOORE and TERESA L.  
MOORE on behalf of Malinda M.  
Fransisco and Travis William Lee Lackey,

Plaintiffs,

v.

MUSCOGEE (CREEK) NATION; BILL  
FIFE; PATRICK MOORE; CHARLES  
TRIPP; SCOTT JOHNSON; REDINA  
MINYARD; NANCY MASON; TIM  
POSEY; MICHAEL YEKSAVICH,

Case No. 95-CV-1149-H ✓

ENTERED ON DOCKET

DATE 4-2-96

ORDER

This matter comes before the Court on Plaintiff's Motion for Leave to Proceed *In Forma Pauperis* (Docket #2).

This lawsuit arises out of a dispute over the custody of the minor child, Travis William Lee Lackey, whose mother is Malinda Fransisco. Plaintiff Teresa Moore is the child's maternal grandmother, and Plaintiff Charles Moore is the husband of Teresa Moore and Ms. Fransisco's step-father. The child is currently the subject of a custody dispute in the tribal courts of the Muscogee (Creek) Nation ("the Nation").

Plaintiffs brought this action, alleging 54 claims against the Nation and the individual defendants.<sup>1</sup> In a previous lawsuit, case number 95-CV-236-H, Plaintiffs brought identical claims

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<sup>1</sup>The Complaint includes the following charges: Abuse of Process; Blind to Child Juvenile Federal Law Kidnaping; 1983 Civil Rights Act; Violation of Parental Rights; Due Process of the Law; Violation of the Bill of Rights; Child Endangerment; Detained Against Their Will; Contributing to the Delinquency of a Minor; Lack of Medical Attention and Neglect; Lack of Medical Attention for a High Risk Baby; Placing a Child into a Situation Where He Is Too Young to Understand; Placing a Child into a Home Where There Is Potential for Harm; Death Threats; Material Alteration of Documents; Attaint; Bad Faith; Badges of Fraud; Breach of Duty; Breach of Promise; Breach of Trust; Breach of Trust with Fraudulent Intent; Slander and Deformation [sic] of Character; Code of Professional Responsibility; Coercion; Collusion; Color of Law; Concealment; Confrontation Clause; Conspiracy; Contempt of Court; Accessory to Statutory Rape; Perjury; Overt Act; Moral Tipitude [sic]; Mifeasance; Misconduct in Office; Mental

against the Muscogee (Creek) Nation and many of the same individual defendants. Concluding that Plaintiffs were essentially challenging the Nation's custody of the minor child, the Court noted that under the circumstances the only available avenue of federal court relief was by means of the Indian Child Welfare Act ("ICWA"). 25 U.S.C. §§ 1901-1934. Accordingly, the Court entered an Order on July 20, 1995, holding that the Court did not have subject matter jurisdiction and instructing Plaintiffs to file an amended complaint within ten days if they possessed facts sufficient to state a claim under the ICWA. Although Plaintiffs were represented by counsel at that time, their amended complaint also failed to allege a claim under the ICWA. Pursuant to its earlier order, the Court therefore dismissed the case for lack of subject matter jurisdiction on November 15, 1995. Plaintiffs did not appeal the dismissal. Instead, two days later, on November 17, 1995, Plaintiffs filed this action, reasserting the same claims but failing once again to allege any violation under the ICWA.

Plaintiffs seek to proceed *in forma pauperis* in this case. Section 1915(a) of Title 28 of the United States Code provides:

Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

In the instant case, only Plaintiff Charles Moore has issued an affidavit in accordance with Section 1915(a). Although the documents filed in this case are replete with references to the fact that Plaintiff Teresa Moore is a registered pediatric nurse, Plaintiffs include no statement whatsoever as to her income. The Court notes that Plaintiff Charles Moore arguably included his wife's living expenses in his affidavit while omitting any reference to her financial contribution to the marriage. See Monti v. McKeon, 600 F. Supp. 112 (D. Conn. 1984) (denying in forma pauperis status to wife who

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Cruelty; Mental Anguish; Malpractice; Malice Afforethought [sic]; Legal Fiction; Failure of Full Faith and Credit; Frivolous Claims; Violation of Freedom of Speech; Intrinsic Fraud; Fraud in Fact; Constructive Fraud; Fraud; Forcible Detainer; Illegal Emancipation; Defraud; and Covenant.

testified that she was supported by her husband and included his living expenses in her affidavit while omitting any reference to his salary). The affidavit of Charles Moore is therefore insufficient to allow Plaintiffs to proceed *in forma pauperis*. Therefore, Plaintiff's Motion to Proceed In Forma Pauperis is hereby denied.

In addition, for the reasons set forth in the Court's Order entered July 20, 1995 in case number 95-CV-236-H, the Court concludes that it is without subject matter jurisdiction. Accordingly, this case is hereby dismissed.

IT IS SO ORDERED.

This 4<sup>th</sup> day of April, 1996.

  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
MAR 29 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FREEMAN R. ARKEKETA, JR.,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

Case No. 95-C-337-K ✓

ENTERED ON DOCKET  
DATE APR 02 1996

**REPORT AND RECOMMENDATION**

Plaintiff filed this action against Defendant Stanley Glanz on April 14, 1995. Plaintiff, appearing pro se, asserts that prison officials have refused to provide him underwear and have refused to allow outside sources to provide underwear to him. Defendant filed a Motion for Summary Judgment and/or Motion to Dismiss on August 17, 1995 [Doc. Nos. 17-1 and 17-2]. By minute order dated April 14, 1995, the District Court referred this action for further proceedings consistent with the Magistrate Judge's jurisdiction. For the reasons discussed below, the United States Magistrate Judge recommends that Defendants' Motion for Summary Judgment and/or Motion to Dismiss should be **DENIED** in part, and **GRANTED** in part.

**I. PROCEDURAL BACKGROUND AND FACTS**

Plaintiff filed a 42 U.S.C. § 1983 ("Section 1983") complaint on April 14, 1994 [Doc. No. 1-1], alleging that he was not permitted underwear unless he purchased it from the Tulsa County Jail. Plaintiff further asserted that female inmates were allowed to receive underclothing from outside sources. Plaintiff asserted that he is

indigent and an American Indian and is being treated differently from "males with money and all females." See Complaint, filed April 14, 1994.

Defendant filed a Motion for a More Definite Statement of Fact on May 30, 1995. [Doc. No. 3-1]. By minute order dated June 7, 1995, Defendant's Motion was granted.<sup>1/</sup> Plaintiff filed a Response to the Motion on June 8, 1995. [Doc. No. 7-1]. Plaintiff also filed an "amended" civil rights complaint on June 15, 1995, titled "Civil Rights Complaint and More Definite Statement." [Doc. No. 8-1]. The Complaint asserts that Plaintiff is "being denied [the] opportunity or ability to obtain underwear [sic] as others in jail on account of his status as indigent and his sex as a male." See Amended Complaint, filed June 15, 1995 [Doc. No. 8-1]. Plaintiff asserts that it is a violation of the Equal Protection Clause to treat prisoners differently based on their sex or economic status. Id. Plaintiff filed a "second" Amended Complaint on July 10, 1995. Plaintiff again asserted that he was being deprived of underwear in violation of the Equal Protection Clause. Plaintiff alleged that the only way he could obtain underwear was by purchasing it for \$3.05 from the jail commissary. Plaintiff additionally asserted that he was unable to obtain socks, which cost \$1.00. Plaintiff asserted that the jail had no policy to allow underwear or socks for indigent prisoners. Plaintiff also alleged that the jail commissary "does not stock nor sell underwear [sic] to males over size 'X-large'." See Amended Complaint, filed July 10, 1995. Plaintiff

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<sup>1/</sup> Plaintiff has filed an objection to this order. Plaintiff also filed an "amended" complaint labeled "more definite statement."

concluded that Defendant was improperly treating prisoners differently "because of their sex or economic status, or size as to wearing socks or underwear [sic]." Id.

Defendant filed a Motion for Summary Judgment and/or a Motion to Dismiss on August 17, 1995. Defendant alleges that Plaintiff has failed to state a cause of action under 42 U.S.C. § 1983, that Plaintiff has not pled sufficient facts to assert liability under the theory of respondeat superior, and that Defendant should be granted qualified immunity.

Plaintiff's response to the Motion was filed August 24, 1995. Appended to Plaintiff's response was "Prisoner Request and Grievance Form" from prisoner "Zac Buffington." Mr. Buffington stated (in his grievance) that his underwear and socks had been taken upon his arrival at the Tulsa County Jail after a transfer from Arkansas, and he requested a pair of socks and some underwear. The "response" dated July 5, 1995 was "[w]e do not provide sox [sic] and underwear [sic]." A second appended grievance form by prisoner Charles Hodges states that he is indigent and requests two pairs of underwear. The response provided is: "[w]e are out at this time." On August 28, 1995, Plaintiff filed a Motion to Supplement his Memorandum with an additional Exhibit. [Doc. No. 21-1]. The Exhibit, dated August 19, 1995, is a "Prisoner Request and Grievance Form" by prisoner Jerry Dan Payne, requesting a "pair of underwear [sic] (small) and socks." The response on the grievance form states "[t]he policy of the Sheriff's office does not allow for underwear or socks to be provided to inmates, regardless of an indigents [sic] status."

## II. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in favor of the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and must set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, when viewed in the light most favorable to the non-movant, fails

to show that a genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

### III. § 1983 AND VIOLATION OF A CONSTITUTIONAL RIGHT

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. A Section 1983 action requires the assertion of a violation of a constitutional right. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991). Plaintiff has asserted that he has been deprived of underwear and socks. However, the deprivation of underwear and/or socks does not, alone, rise to the level of a Federal Constitutional violation.<sup>2/</sup> Consequently, Plaintiff's "bare allegations" that he has been deprived of a "right" to underwear and/or socks does not assert a cause of action under Section 1983. To the extent Plaintiff's complaint alleges solely that he was deprived of underwear or socks, Defendant's Motion to Dismiss must be **GRANTED**.

However, Plaintiff has also asserted that the actions of the Defendant violate the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment provides that "similarly situated entities" shall be treated equally. To the extent Plaintiff alleges a prima facie case under the Fourteenth Amendment, Plaintiff asserts the violation of a Federal Constitutional right, and Defendant's Motion to Dismiss (based on Plaintiff's failure to assert the violation of a Federal Constitutional right) should be **DENIED**.

#### **IV. THEORY OF RESPONDENT SUPERIOR**

Defendant asserts that Plaintiff has failed to allege sufficient facts to support a theory of a formal or informal policy, and that Plaintiff has not asserted personal

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<sup>2/</sup> Plaintiff additionally asserts in his Brief in Reponse to Defendant's Motion [Doc. No. 19-1], that Defendant is violating certain state statutes. However, Plaintiff's alleged violations of state statutes do not assert a violation of a Federal Constitutional right.

involvement by Defendant Glanz. Defendant therefore concludes that the only basis for Plaintiff's Section 1983 action would be under a theory of respondeat superior, and Plaintiff cannot establish the requisite elements. Defendant relies on Monnell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) as "stand[ing] for the proposition that without showing that the defendants have approved a policy or custom which denies a constitutional right, policy makers cannot be held liable on respondeat superior basis under § 1983 based on a single incident of alleged misconduct." Defendant's Motion to Dismiss and/or Motion for Summary Judgment, filed August 17, 1996 [Doc. No. 18-1] at 7.

Defendant is correct that under Monnell the government (or a superior) cannot be found liable solely under the doctrine of respondeat superior. Monnell, 436 U.S. at 691. However, Monnell additionally held that local governmental entities can be sued under Section 1983 for unconstitutional policies. Monnell, 436 U.S. 686, 690 (1978) ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to

governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels.").

In this case, Plaintiff asserts that the Defendant has a policy of denying underwear to males while permitting relatives to provide underwear to females, and permitting those who can afford it to purchase underwear and socks from the jail commissary. Plaintiff's theories are not premised on the doctrine of respondeat superior, and Defendant's Motion to Dismiss on this basis should be **DENIED**.

#### **V. EQUAL PROTECTION ANALYSIS**

Plaintiff asserts that Defendant's policy is a violation of the Equal Protection Clause. Plaintiff alleges he is an indigent American Indian male prisoner and that he has been denied underwear (size, x-large) and socks. Defendant does not specifically address Plaintiff's Equal Protection argument. Plaintiff's claims, at this stage of the litigation, are construed in favor of the non-moving party.

The Fourteenth Amendment (Equal Protection Clause) requires that no person be denied equal protection under the law. Equal protection merely insures that if the government draws a classification, the classification is reasonably (or strictly, depending upon the "group" classified) related to a legitimate governmental purpose. A case asserting a violation of the Equal Protection Clause requires, at a minimum, an assertion that similarly situated "entities" are being treated differently, and the identification of the "classification."

## **ECONOMIC STATUS**

Plaintiff asserts that the Tulsa County Jail refuses to provide underwear or socks to indigent prisoners, that relatives are not permitted to supply underwear to prisoners, and that to obtain underwear or socks a prisoner must purchase it from the jail commissary. According to Plaintiff, underwear costs \$3.05 and socks cost \$1.00. Plaintiff contends that he is indigent and is therefore denied the "equal opportunity" to purchase underwear or socks although "similarly situated" prisoners who have money are permitted to purchase underwear and socks. Plaintiff appended to his response to Defendant's Motion to Dismiss a grievance form noting that the sheriff's office does not provide socks or underwear. In addition, a grievance form dated August 29, 1995 (appended to Doc. No. 21-1) states that the "policy of the Sheriff's office" is to refuse to provide underwear or socks to a prisoner regardless of the indigent's status.

"Economic status" is not a suspect classification. See, e.g., Maher v. Roe, 432 U.S. 468, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); Oklahoma Education Association v. Alcoholic Beverage Laws Enforcement Commission, 889 F.2d 929 (10th Cir. 1989) ("It is well settled that economic and social legislation generally is presumed valid. We will sustain such legislation if the classifications drawn by the statute are rationally related to a legitimate state interest."). Therefore, assuming

Plaintiff's allegations are sufficient to allege a prima facie case,<sup>3/</sup> the policy of the Sheriff's office would be examined under a rational basis analysis.<sup>4/</sup>

Under the rational basis standard, Plaintiff prevails only if (1) he is similarly situated with inmates who are treated differently by the Tulsa County Sheriff's Department, and (2) the Tulsa County Sheriff's Department has no rational basis for the dissimilar treatment. See Moreland v. United States, 968 F.2d 655, 660 (8th Cir.) (en banc), cert. denied, 506 U.S. 1028 (1992); Buckley Const., Inc. v. Shawnee Civic & Cultural Development Authority, 933 F.2d 853 (10th Cir. 1991). Plaintiff has alleged a prima facie case, and Defendant has not responded to the specifics of Plaintiff's claims. Defendant's Motion to Dismiss should be **DENIED**.

#### **GENDER**

Plaintiff additionally asserts that the Tulsa County Jail permits relatives of female prisoners to provide underwear for female prisoners, but that relatives of male prisoners are prohibited from providing underwear for male prisoners. Plaintiff asserts that male prisoners are permitted underwear only if the male prisoner purchases the

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<sup>3/</sup> To establish an equal protection claim, Plaintiff must establish discrimination. "[S]omething more than mere speculation and conjecture is necessary for proof." See, e.g., United States v. Manuel, 992 F.2d 272, 276 (10th Cir. 1993).

<sup>4/</sup> "Equal protection analysis proceeds generally along two separate standards of review. If the petitioner is a member of a suspect class or if he is being denied a fundamental right the courts use a strict scrutiny test. . . . [If a fundamental right or suspect class is not involved] we examine the . . . claim under the test of whether the action being challenged is rationally related to legitimate governmental objectives. Schweiker v. Wilson, 450 U.S. 221, 230 (1981)." Yokley v. Belaski, 982 F.2d 423 (10th Cir. 1992) (citations omitted).

underwear from the jail commissary.<sup>5/</sup> Plaintiff makes no similar allegations with respect to the receipt of socks from outside sources.

Defendant asserts that Plaintiff has asserted only "bald conclusions unsupported by allegations of fact" which are legally insufficient to support Plaintiff's claim that the Equal Protection Clause is violated by the actions of Defendant.

Plaintiff's basic argument is that male prisoners are treated differently from female prisoners with respect to the provision of underwear. A classification drawn on the basis of gender is subjected to intermediate scrutiny.

It is well settled that economic and social legislation generally is presumed valid. We will sustain such legislation if the classifications drawn by the statute are rationally related to a legitimate state interest. When legislation categorizes persons using "suspect" classifications such as race or national origin, we depart from the general rule and apply strict scrutiny, sustaining the law only if it is narrowly tailored to serve a compelling state interest. We subject "quasi-suspect" classifications based on characteristics beyond an individual's control, such as gender, illegitimacy, and alienage, to intermediate review, and will uphold the law only if it is substantially related to an important or substantial state interest.

Oklahoma Education Association v. Alcoholic Beverage Laws Enforcement Commission, 889 F.2d 929 (10th Cir. 1989) (citations omitted) (emphasis added).

Although Plaintiff has asserted a prima facie case, the "Equal Protection Clause has long been limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers." Briscoe v. Kusper, 435

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<sup>5/</sup> Plaintiff also asserts that if "drastic" action is taken (such as filing a lawsuit), an indigent prisoner may be provided underwear.

F.2d 1046, 1052 (7th Cir. 1970). However, Defendant has not addressed the specifics of Plaintiff's claim, and, at this stage of the litigation, Defendant's Motion to Dismiss should be **DENIED**.

#### **UNDERWEAR SIZE**

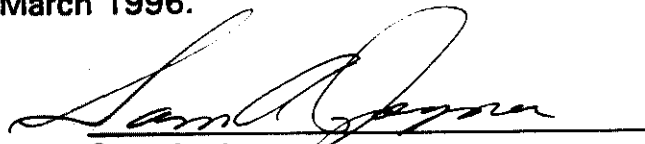
Plaintiff additionally asserts that men who are "size extra-large and above" are denied equal protection because the jail commissary does not stock underwear in these sizes. To the extent Plaintiff's claim alleges a prima facie case, whether the claim constitutes an equal protection clause violation would be evaluated under the "rational basis test" because "size" is not a suspect class.

### **RECOMMENDATION**

The United States Magistrate Judge recommends that the District Court **DENY** Defendant's Motions for Summary Judgment and/or to Dismiss [Doc. Nos. 17-1, 17-2] with respect to Plaintiff's Equal Protection claims. However, to the extent Plaintiff's Petition attempts to assert a claim based upon a constitutional right to underwear or socks, the United States Magistrate Judge recommends that the District Court **GRANT** Defendant's Motion to Dismiss.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of the receipt of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 29 day of March 1996.

  
Sam A. Joyner  
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT W. HOPPER,

Defendant.

Case No. 96-C-53-BU

ENTERED ON DOCKET

DATE APR 01 1996

**ADMINISTRATIVE CLOSING ORDER**

The Court has reviewed the Notice of Automatic Stay filed by Defendant, Robert W. Hopper. Having done so, the Court concludes that this matter should be administratively closed during the pendency of the bankruptcy proceedings before the United States Bankruptcy Court for the Northern District of Oklahoma. It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the bankruptcy proceedings.

The parties are DIRECTED to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may reopen this matter, if necessary, to obtain a final determination of this litigation.

ENTERED this 29<sup>th</sup> day of ~~April~~<sup>March</sup>, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

DATE 4-1-96

**FILED**

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA

Plaintiff,

vs.

Margie D. Ott, D.O.,

Defendant.

CIVIL ACTION NO. 95-MC058H

RELEASE OF JUDGMENT

The United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, states that on August 4, 1993, a Judgment was rendered against Margie D. Ott, D.O. for the principal sum of \$18,870.81, plus interest and costs. Debtor has paid the debt in full.

THEREFORE, the United States of America does hereby release the Judgment debt entered on August 4, 1993, against Margie D. Ott, D.O..

DATED this 29<sup>th</sup> day of March, 1996.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

*Loretta F. Radford*  
LORETTA F. RADFORD, OBA # 11158  
Assistant United States Attorney  
333, W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 29<sup>th</sup> day of March, 1996, a true and correct copy of the foregoing was mailed, postage prepaid, to Margie D. Ott, D.O., 7006 E. 89th Place, Tulsa, Oklahoma 74133.

*Loretta F. Radford*  
LORETTA F. RADFORD  
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MISTY L. MOYDELL aka MISTY  
MOYDELL aka MISTY LYNN  
MOYDELL; JEFFREY D. MOYDELL  
aka JEFFREY DAVID MOYDELL aka  
JEFF D. MOYDELL aka JEFFREY  
MOYDELL; TULSA ADJUSTMENT  
BUREAU, INC.; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE **APR 01 1996**

Civil Case No. 95-CV 1061BU

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 29 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, **Tulsa County**, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, **Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, **Oklahoma**; the Defendant, TULSA ADJUSTMENT BUREAU, INC., appears not having previously filed its Disclaimer; and the Defendants, MISTY L. MOYDELL aka MISTY MOYDELL aka MISTY LYNN MOYDELL and JEFFREY D. MOYDELL aka JEFFREY DAVID MOYDELL aka JEFF D. MOYDELL aka JEFFREY MOYDELL, appear not, but make default.

NOTE:

THIS DOCUMENT IS NOT  
FOR FILING IN THE  
PROCEEDINGS OF THE  
UPON RECEIPT.

The Court being fully advised and having examined the court file finds that the Defendant, MISTY L. MOYDELL aka **MISTY MOYDELL** aka MISTY LYNN MOYDELL will hereinafter be referred to as ("MISTY L. MOYDELL") and the Defendant, JEFFREY D. MOYDELL aka JEFFREY DAVID **MOYDELL** aka JEFF D. MOYDELL aka JEFFREY MOYDELL will hereinafter be referred to as ("JEFFREY D. MOYDELL"). The Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL are both single, unmarried persons.

The Court being fully advised and having examined the court file finds that the Defendant, TULSA ADJUSTMENT BUREAU, INC., waived service of Summons on October 31, 1995.

The Court further finds that the Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning January 11, 1996, and continuing through February 15, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants,

MISTY L. MOYDELL and JEFFREY D. MOYDELL. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on November 1, 1995; that the Defendant, TULSA ADJUSTMENT BUREAU, INC., filed its Disclaimer on November 3, 1995; and that the Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-six (26), Block Twenty-one (21), VAL-CHARLES ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on September 26, 1979, Larry K. Hensley and Karan Hensley, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION their mortgage note in the amount of \$29,400.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Larry K. Hensley and Karan Hensley, husband and wife, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION a mortgage dated September 26, 1979, covering the above-described property. Said mortgage was recorded on October 2, 1979, in Book 4431, Page 689, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 27, 1980, WESTERN PACIFIC FINANCIAL CORPORATION assigned the above-described mortgage note and mortgage to Security Pacific Mortgage Corporation. This Assignment of Mortgage was recorded on August 6, 1980, in Book 4489, Page 356, in the records of Tulsa County, Oklahoma. Another Assignment of mortgage, almost identical to the above mentioned assignment, dated October 9, 1979, from WESTERN PACIFIC FINANCIAL CORPORATION to Security Pacific Mortgage Corporation, was recorded on August 13, 1982 in Book 4631, Page 793, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1987, SECURITY PACIFIC MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to FLEET REAL ESTATE FUNDING CORP. This Assignment of Mortgage was recorded on March 14, 1988, in Book 5086, Page 2531, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 14, 1990, FLEET REAL ESTATE FUNDING CORP. assigned the above-described mortgage note and mortgage to the

SECRETARY OF HOUSING & URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on November 19, 1990, in Book 5289, Page 401, in the records of Tulsa County, Oklahoma.

The Court further finds ~~that the~~ Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, are the ~~current title~~ owners of the property by virtue of a General Warranty Deed dated June 6, 1988, and recorded on June 10, 1988 in Book 5106, Page 1405, in the records of Tulsa County, Oklahoma. The Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, are the ~~current~~ assumptors of the subject indebtedness.

The Court further finds ~~that~~ on November 1, 1990, the Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 1, 1991.

The Court further finds ~~that the~~ Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, are indebted to the Plaintiff in the principal sum of \$41,431.38, plus interest at the rate of 10 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds ~~that the~~ Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by

virtue of ad valorem taxes in the amount of \$357.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$23.00 which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, TULSA ADJUSTMENT BUREAU, INC., disclaims any right, title, or interest in the subject property.

The Court further finds that the Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, in the principal sum of \$41,431.38 plus interest at the rate of 10 percent per annum from April 1, 1995 until judgment, plus interest

thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$357.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$23.00, plus costs and interest, for personal property taxes for the year 1991, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, MISTY L. MOYDELL, JEFFREY D. MOYDELL, TULSA ADJUSTMENT BUREAU, INC. and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, MISTY L. MOYDELL and JEFFREY D. MOYDELL, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of **this** action accrued and accruing incurred by the Plaintiff, **including** the costs of sale of said real property;

**Second:**

In payment of Defendant, **COUNTY TREASURER**, Tulsa County, Oklahoma, in the **amount** of \$357.00, plus penalties and interest, for ad valorem **taxes** which are presently due and owing on said real property;

**Third:**

In payment of the judgment **rendered** herein in favor of the Plaintiff;

**Fourth:**

In payment of Defendant, **COUNTY TREASURER**, Tulsa County, Oklahoma, in the **amount** of \$23.00, personal property taxes which are **currently** due and owing.

The surplus from said sale, if any, shall **be deposited** with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall **be no** right of redemption (including in all instances any right to possession based **upon any** right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

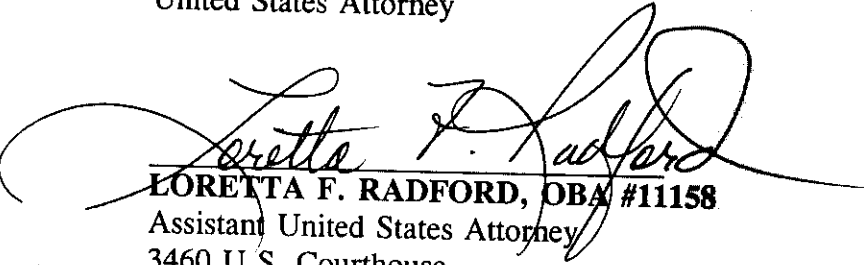
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described **real** property, under and by virtue of this judgment and decree, all of the Defendants and **all persons** claiming under them since the filing of the Complaint, be and they are forever **barred and** foreclosed of any right, title, interest or claim in or to the subject real property or any **part** thereof.

**s/ MICHAEL BURRAGE**

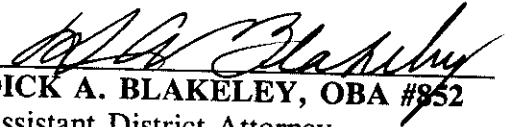
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**DICK A. BLAKELEY, OBA #852**  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95-CV 1061BU  
LFR/lg

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LESLIE D. ROWE; LISE A. ROWE;  
UNITED BANKERS MORTGAGE  
CORPORATION; STATE OF  
OKLAHOMA ex rel OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Washington County, Oklahoma; BOARD  
OF COUNTY COMMISSIONERS,  
Washington County, Oklahoma,

Defendants.

**FILED**

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE APR 01 1996

Civil Case No. 95-CV 1002C

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 28 day of March,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Washington County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, appear by Thomas Janer, Assistant District Attorney, Washington County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears by Assistant General Counsel, Kim D. Ashley; and the Defendants, LESLIE D. ROWE, LISE A. ROWE, and UNITED BANKERS MORTGAGE CORPORATION, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, LESLIE D. ROWE and LISE A. ROWE are husband and wife.

The Court being fully **advised** and having examined the court file finds that the Defendant, LESLIE D. ROWE, waived **service** of Summons on or about December 4, 1995; that the Defendant, LISE A. ROWE, waived **service** of Summons on November 12, 1995; and that the Defendant, UNITED BANKERS MORTGAGE CORPORATION, acknowledged receipt of Summons and Complaint via **certified** mail on October 19, 1995; that the Defendants, COUNTY TREASURER, **Washington** County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, **Washington** County, Oklahoma, acknowledged receipt of Summons and Complaint via **Certified mail** on October 6, 1995.

It appears that the Defendants, COUNTY TREASURER, Washington County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, filed their Answer on October 19, 1995; **that the** Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, **filed** its Answer on October 23, 1995; and that the Defendants, LESLIE D. ROWE, LISE A. ROWE, and UNITED BANKERS MORTGAGE CORPORATION, have failed to answer **and** their default has therefore been entered by the Clerk of this Court.

The Court further finds **that this** is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing **said** mortgage note upon the following described real property located in **Washington County**, Oklahoma, within the Northern Judicial District of Oklahoma:

THE NORTH 10 ACRES OF LOT 1 OF SECTION 14,  
TOWNSHIP 27 NORTH, RANGE 12 EAST OF THE  
INDIAN MERIDIAN, **WASHINGTON** COUNTY,  
OKLAHOMA.

The Court further finds that on April 15, 1986, Gregory L. Norris and Karen J. Norris, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION their mortgage note in the amount of \$56,622.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Gregory L. Norris and Karen J. Norris, Husband and Wife, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION a mortgage dated April 15, 1986, covering the above-described property. Said mortgage was recorded on April 16, 1986, in Book 838, Page 1370, in the records of Washington County, Oklahoma.

The Court further finds that on September 30, 1993, OLD OTM CO. FORMERLY OAK TREE MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to COMMERCE SERVICE CORPORATION d/b a OAK TREE MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on December 28, 1993, in Book 878, Page 503, in the records of Washington County, Oklahoma.

The Court further finds that on February 10, 1994, COMMERCE SERVICE CORPORATION d/b a OAK TREE MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, HIS SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on February 14, 1994, in Book 879, Page 788, in the records of Washington County, Oklahoma.

The Court further finds that the Defendants, LESLIE D. ROWE and LISE A. ROWE, currently hold the record title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds ~~that~~ on January 12, 1994, the Defendants, LESLIE D. ROWE and LISE A. ROWE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due ~~under~~ the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds ~~that the~~ Defendants, LESLIE D. ROWE and LISE A. ROWE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, LESLIE D. ROWE and LISE A. ROWE, are indebted to the Plaintiff in the principal sum of \$64,922.42, plus interest at the rate of 10 percent per annum from September 18, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds ~~that the~~ Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, has a lien on the subject property in the current amount of \$54.87, by virtue of a tax warrant, which became a lien as of March 28, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds ~~that the~~ Defendants, LESLIE D. ROWE, LISE A. ROWE, and UNITED BANKERS MORTGAGE CORPORATION, are in default, and have no right, title or interest in the subject real property.

The Court further finds ~~that the~~ Defendants, COUNTY TREASURER, Washington County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, LESLIE D. ROWE and LISE A. ROWE, in the principal sum of \$64,922.42, plus interest at the rate of 10 percent per annum from September 18, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, have and recover judgment in rem in the current amount of \$54.87 for a tax warrant, plus the costs of this action and interest.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, LESLIE D. ROWE, LISE A. ROW, UNITED BANKERS MORTGAGE CORPORATION, COUNTY TREASURER, Washington County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, LESLIE D. ROWE and LISE A. ROWE, to satisfy the money

judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, in the amount of \$54.87, plus accrued and accruing interest, for state taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

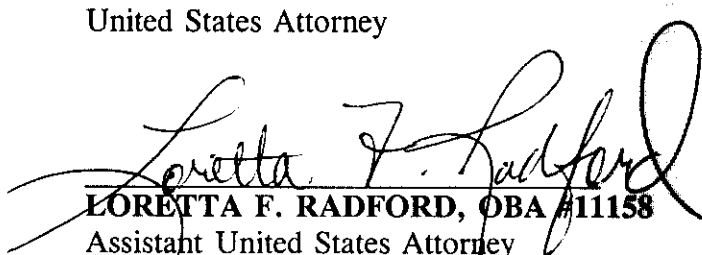
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described **real property**, under and by virtue of this judgment and decree, all of the Defendants and **all persons** claiming under them since the filing of the Complaint, be and they are forever **barred and foreclosed** of any right, title, interest or claim in or to the subject real property or any **part** thereof.

(Signed) H. Dale Olson


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**THOMAS JANER, OBA #11110**  
Assistant District Attorney  
Washington County Courthouse  
420 S. Johnstone St.  
(918) 337-2860  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Washington County, Oklahoma

  
**KIM D. ASHLEY, OBA #14175**

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 521-3141

Attorney for Defendant,

State of Oklahoma ex rel

Oklahoma Tax Commission

Judgment of Foreclosure

Civil Action No. 95-CV 1002C

LFR/lg

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FRANK NORRIS GOODMAN, JR., and  
CHERYL GOODMAN,

Plaintiffs,

vs.

No. 95-C-532-E ✓

STRATFORD INSURANCE COMPANY,  
a foreign corporation,

Defendant.

ENTERED ON DOCKET

DATE APR 01 1996

**ADMINISTRATIVE CLOSING ORDER**

The Court has been advised by the clerk's office that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 28<sup>th</sup> day of March, 1996.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM WICKHAM,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner,  
Social Security Administration,

Defendant.

94-C-416-B

FILED

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FILED ON DOCKET


APR 6 1996

ORDER

Before the Court is Plaintiff's Motion for Attorney's Fees (Docket #13) in the amount of \$1,937.25. The Court has jurisdiction to award attorney's fees under the Social Security Act for services rendered. Harris v. Secretary of HHS, 836 F.2d 496 (10th Cir. 1987). The defendant filed no response to the Motion.

The Court concludes Plaintiff's Motion for Attorney's Fees should be and the same is hereby GRANTED. Plaintiff's attorney, Paul F. McTighe, is awarded an attorney's fee in the amount of \$1,937.25.

IT IS SO ORDERED this 29<sup>th</sup> day of March, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

7

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED  
MAR 29 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JACQUI STARR, an individual,  
Plaintiff,

vs.

PEARLE VISION, INC., d/b/a  
PEARLE VISION EXPRESS,  
a corporation,

Defendant.

Case No. 92-C-463-B

ENTERED ON DOCKET  
APR 01 1996

ORDER

Before the Court is Plaintiff's Appeal of the Taxing of Costs (Docket #98). The Court Clerk, after a hearing on February 28, 1996, assessed \$2,556.69 in costs against Plaintiff.

Plaintiff alleges that (1) assessing costs violates the automatic stay provisions of 11 U.S.C. § 362; (2) the Court Clerk should have excluded any costs incurred before July 7, 1993, which is the date Plaintiff filed her bankruptcy petition; and (3) the Court Clerk did not determine against whom the costs should be assessed, Plaintiff or Plaintiff's bankruptcy estate.

The Court believes that such issues are better addressed by the Bankruptcy Court, which expressly approved her proceeding in this case after her bankruptcy petition was filed.<sup>1</sup> Because Plaintiff makes no objections as to whether the costs assessed were proper, the Court hereby affirms the Court Clerk's award of costs

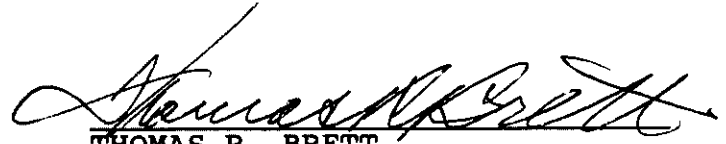
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<sup>1</sup>This also applies to Plaintiff's allegations that Defendant is liable for actual and punitive damages for violating the automatic stay provisions of bankruptcy law.

100

in the amount of \$2,556.69.

IT IS SO ORDERED this 29<sup>th</sup> day of March, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

THELMA R. SHERRIFF,  
Plaintiff,

vs.

RALPH L. JONES, JR.,  
Defendant

Civil Action No. 95-C-401B

ENTERED ON DOCKET  
DATE APR 8 1 1996

ORDER OF DISMISSAL

NOW on this 29 day of MAR, 1996, Plaintiff's Application for Dismissal with Prejudice comes for consideration. The Court has reviewed the Application; finds that it is for good cause, and that it should be granted.

IT IS THEREFORE ORDERED, that this action is dismissed with prejudice.

  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARL DUVALL, )  
)  
Plaintiff, )  
)  
vs. )  
)  
AUSTRALIAN BODY CARE )  
ENTERPRISES, INC., a Nevada )  
corporation formerly known as )  
Australian BodyCare U.S.A., Inc., )  
a California corporation; and )  
TONY SCHOONOVER, in his )  
individual capacity and )  
President and Secretary/ )  
Treasurer of Australian )  
Bodycare Enterprises, Inc., )  
)  
Defendants. )

Case No. 95-C-1006-B

ENTERED ON DOCKET  
APR 8 / 1996  
DATE

ORDER

Before the Court are Defendants' Motion to Dismiss (Docket #2), Plaintiff's Motion for Joinder of Additional Parties Plaintiff and to File Amended Complaint (Docket #14).

Plaintiff Carl Duvall filed this action<sup>1</sup> on September 14, 1995, in Tulsa County District Court. Defendants removed the case on October 6, 1996, based on diversity of citizenship and filed a Motion to Dismiss, alleging that the contract's forum selection clause mandates dismissal due to improper venue. Duvall, however, died soon after he filed his response brief to the motion. Duvall's personal representative was substituted as plaintiff on February 12, 1996. Each side filed supplements to the Motion to

<sup>1</sup>Plaintiff alleges breach of contract, fraud and slander.

Dismiss, which the Court now considers.

The forum selection clause at issue provides that:

The Independent Representative Application and Agreement shall be governed in all respects by the laws of the State of Nevada. All claims, disputes or other legal matters between the Independent representative and Australian BodyCare U.S.A., Inc., shall be adjudicated in state or federal court located in Washoe County, Nevada. This county shall be deemed the sole and appropriate place of jurisdiction and venue.

(Defendants' Ex. 2)

"Forum selection provisions are 'prima facie valid' and a party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-10, 92 S. Ct. 1907, 1913, 32 L.Ed.2d 513 (1972); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 957 (10th Cir.), cert. denied, 113 S. Ct. 658 (1992). See also Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522, 1526-28 (1991); Janko v. Outboard Marine Corp., 605 F. Supp. 51, 52 (W.D. Okla. 1985); Furry v. First Nat'l Monetary Corp., 602 F. Supp. 6, 8 (W.D. Okla. 1984).

Plaintiff's allegations apparently fall under the Bremen exception that "enforcement would be unreasonable and unjust under the circumstances". Bremen, 407 U.S. at 10. "A party seeking to avoid a forum selection clause on the ground that enforcement would be unreasonable must show that 'trial in the contractual forum will

be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." Vijuk v. GUK-Falzmaschinen Griesser & Kunzmann, 902 F. Supp. 162, 164 (N.D. Ill. 1995), citing Bremen, 407 U.S. at 18, 92 S. Ct. at 1916.

Plaintiff makes the following allegations as support of its contention that the forum selection clause is invalid:

1. It has no assets that would make it economically feasible to litigate this claim in Nevada;

2. the contract was with Australian BodyCare U.S.A., Inc., a California corporation that no longer exists, and there is no contract with Australian BodyCare Enterprises, Inc., a Nevada corporation that is the successor to Australian BodyCare U.S.A., Inc. Plaintiff further alleges that it makes no claim against the now-defunct California corporation;

3. Duvall did not read the forum selection clause and agree to it; therefore, it is not part of the consideration for the contract and he had no notice of it; and

4. even if the forum selection clause is valid, there is no such clause with respect to Defendant Schoonover, so, based on judicial economy, this Court should keep the case against Australian BodyCare Enterprises, Inc.

The Court will consider each argument in turn.

#### **1. Economic Feasibility**

Plaintiff first argues that it has no assets with which to pursue litigation in Nevada. However, numerous courts have held that Plaintiff's financial situation, standing alone, is

insufficient to invalidate a forum selection clause. See, e.g., Hunter Distributing Co., Inc. v. Pure Beverage Partners, 820 F. Supp. 284 (N.D. Miss. 1993) ("Certainly, it will be more inconvenient and expensive for plaintiff to litigate his claims in a venue other than this one. However, the inclusion of a forum selection clause does little more than shift these burdens from one party to the other...."); Melnik v. Cunard Line Ltd., 875 F. Supp. 103 (N.D. N.Y. 1994) (Plaintiff who alleges financial hardship and inconvenience in moving witnesses to selected forum "has not met her very heavy burden to justify setting aside the forum selection clause"); Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372 (7th Cir. 1990) ("One who has agreed to be sued in the forum selected...has thereby agreed not to seek to retract his agreement by asking for a change of venue on the basis of costs or inconvenience to himself"); Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286 (7th Cir. 1989) ("By virtue of the forum-selection clause, [the party] has waived the right to assert its own inconvenience as a reason to transfer the case"). Based on the foregoing authorities, the Court holds that Plaintiff's financial situation does not justify setting aside the forum selection clause.

## **2. Contract with Australian BodyCare Enterprises, Inc.**

Plaintiff also alleges that the contract in question is not

with Australian BodyCare Enterprises, the Nevada corporation that succeeded Australian BodyCare U.S.A., Inc., a California corporation; therefore, the forum selection clause does not apply to litigation against the Nevada corporation. Plaintiff further alleges that it makes no claim against the now-defunct California corporation. Plaintiff is taking the untenable position that the contract is valid as to Plaintiff's claims against Australian BodyCare Enterprises but invalid as to the forum selection clause. This inconsistent argument does not support Plaintiff's contention that the forum selection clause should not be enforced.

### 3. Unread Clause

Plaintiff next alleges that Duvall did not read the forum selection clause and agree to it and that the clause is not part of the bargained-for consideration for the contract. Failure to read the contract, however, does not preclude enforcement. "Mere ignorance will not relieve a party of [his] obligations and [he] will be bound by the terms of the agreement." Paper Express Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992). See also Interamerican Trade v. Companhia Fabricadora, 973 F.2d 487 (6th Cir. 1992) (Plaintiff, who complained that the clause was not bargained for, "could have walked away from the contract, being under no compulsion to deal in [Defendant's] products").

The United States Supreme Court also has rejected this

argument, holding that a forum selection clause need not be rejected merely because it was not the subject of bargaining. Carnival Cruise Lines, 111 S. Ct. at 1527. Rather, the Supreme Court looked at the clause to determine whether it was unreasonable or fundamentally unfair. Id. In this case, there is no evidence before the Court that the clause is either unreasonable or fundamentally unfair.


#### 4. Defendant Schoonover

Plaintiff alleges that there is no forum selection clause as to Defendant Schoonover, so, based on judicial economy, this Court should keep the entire case. However, the forum selection clause embraces disputes concerning compliance with the contract, and all of Plaintiff's claims arise out of the alleged breaches of the agreement and causes for such alleged breaches. Interamerican Trade, 973 F.2d at 490. See also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202-03 (3d Cir.), cert. denied, 464 U.S. 938, 104 S. Ct. 349, 78 L.Ed.2d 315 (1983) ("[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses"); Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509 (9th Cir. 1988) ("We agree ... that the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection

clause applies to all defendants.") In this case, the Court holds that the claim against Schoonover is so closely related to the claims against Australian BodyCare Enterprises, Inc., that the forum selection clause applies to the Schoonover claim as well.

In summary, the Court finds that the forum selection clause is not unreasonable nor fundamentally unfair nor procured by fraud; therefore, the clause should be enforced. Defendant's Motion to Dismiss (Docket #2) is granted, which renders moot Plaintiff's Motion for Joinder of Additional Parties Plaintiff and to File Amended Complaint (Docket #14), and Defendant's Motion for Expedited Ruling (Docket #16).

IT IS SO ORDERED this 28 day of March, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**MAR 29 1996**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARK N. THOMPSON aka MARK  
NELSON THOMPSON; DEBORAH L.  
THOMPSON; JACQUELINE L.  
THOMPSON aka JACQUELINE LYNN  
THOMPSON aka JACQUELINE LYNN  
JONES; UNKNOWN SPOUSE IF ANY  
OF JACQUELINE L. THOMPSON aka  
JACQUELINE LYNN THOMPSON aka  
JACQUELINE L. JONES; STATE OF  
OKLAHOMA ex rel OKLAHOMA TAX  
COMMISSION; STATE OF  
OKLAHOMA ex rel DEPARTMENT OF  
HUMAN SERVICES; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 737B

ENTERED ON DOCKET ✓

DATE APR 01 1996

**ORDER**

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, **through** Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is **hereby ORDERED** that the judgment of foreclosure entered on March 1, 1996 is **vacated** and this action shall be dismissed without prejudice.

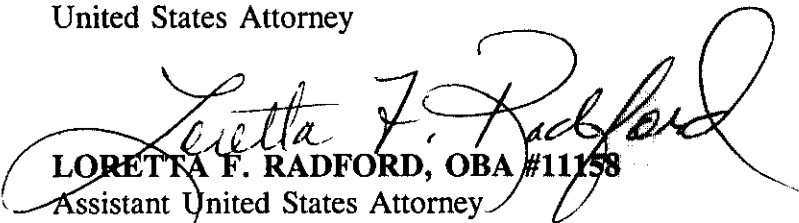
Dated this 29 day of March, 1996.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney

333 W. 4th St., Ste. 3460

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:lg

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RLI INSURANCE COMPANY, an  
Illinois corporation,

Plaintiff,

vs.

KEN LAMP and DENISE LAMP, d/b/a  
MID-AMERICA AVIATION; TOM BODINE,  
Individually and d/b/a  
MID-AMERICA AVIATION; CONNIE R.  
KING, Individually and as  
Personal Representative of the  
Estate of Donald W. King,  
Deceased; JUANITA M. FRANKLIN,  
Individually and as surviving  
spouse of Kenneth W. Franklin,  
Deceased; PHILIP G. DAVIS;  
BARBARA DAVIS; ROSIE SAWYER,  
Individually and as surviving  
spouse of Bradley Scott Sawyer,  
Deceased; LONE STAR INDUSTRIES,  
INC., and NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURG,  
PA,

Defendants.

**FILED**

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 95-C-467-B

ENTERED ON DOCKET ✓

DATE APR 01 1996

DEFAULT JUDGMENT ORDER IN A CIVIL CASE

**DECISION BY THE COURT.**

This action came on for hearing on the motion for default judgment of the plaintiff, RLI Insurance Company, against the defendant, National Union Fire Insurance Company of Pittsburg, PA, and the clerk having entered a "Default by the Clerk" pursuant to Local Rule 55.1(A) the following decision is rendered.

IT IS ORDERED AND ADJUDGED that judgment by default is entered in favor of the plaintiff, RLI Insurance Company, and against the defendant, National Union Fire Insurance Company of Pittsburg, PA, and that National Union Fire Insurance Company of Pittsburg, PA

shall take nothing from any proceeds of the policy of insurance issued by RLI Insurance Company which is the subject of this action for declaratory relief and the issues of declaratory relief are determined in favor of RLI Insurance Company and against National Union Fire Insurance Company of Pittsburgh, PA.

Dated this 29 day of March, 1995.

S/ THOMAS R. BRETT

---

THOMAS R. BRETT,  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 29 1996

IDELL WARD, et al.,  
PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,  
DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 94-C-1059-H

ENTERED ON DOCKET


DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Robert Abbey, Kimberley Abbey, Brock Abbey, Minor, Ethan Abbey, Minor, Kendall Abbey, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsylv-  
ania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

**MAR 29 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 94-C-1059-H

**ENTERED ON DOCKET**


DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Dwaine Bowline, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

**F I L E D**

**MAR 29 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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DEFENDANTS.

ENTERED ON DOCKET

DATE 4-1-96

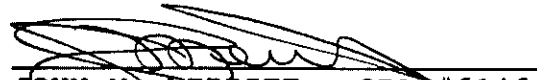
CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Linda Smith and Ulic Smith, only, and the Defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

**FILED**

**MAR 29 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,  
PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsylv-  
ania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.

CASE NO. 94-C-1059-H

ENTERED ON DOCKET


DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Beverly Raleigh, only, and the Defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

**F I L E D**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**MAR 29 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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INC., a Pennsylvania corporation,

DEFENDANTS.

ENTERED ON DOCKET

DATE 4-1-96

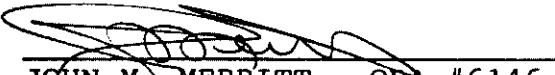
CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Jackie Phillips, only, and the Defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

**FILED**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**MAR 29 1996**

IDELL WARD, et al.,  
PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,  
DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 94-C-1059-H

ENTERED ON DOCKET


DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Floyd Owens and Mavis Owens, only,  
and the Defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC.,  
pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal  
of all claims of such Plaintiff(s) against such Defendant(s)  
without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed  
against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own  
costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**MAR 29 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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DEFENDANTS.

CASE NO. 94-C-1059-H

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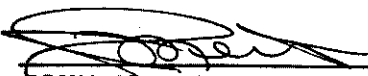
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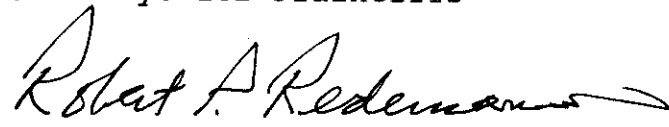
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, James Lee Keith and Marilyn Keith, only, and the Defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsylv-  
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DEFENDANTS.

**MAR 29 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 94-C-1059-H

ENTERED ON DOCKET


DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Vada Dyer, Individually and as the surviving spouse and next of kin of W. Leon Dyer, deceased, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**MAR 29 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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DEFENDANTS.

CASE NO. 94-C-1059-H

ENTERED ON DOCKET


DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Joan Drewel, only, and the Defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

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IDELL WARD, et al.,

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vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 94-C-1059-H

ENTERED ON DOCKET


DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Willie Douglas, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**MAR 29 1996**

IDELL WARD, et al.,  
PLAINTIFFS,

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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INC., a Pennsylvania corporation,

CASE NO. 94-C-1059-H

DEFENDANTS.

ENTERED ON DOCKET

DATE


4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Felton Daniels, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

ENTERED ON DOCKET

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4-1-96  
**FILED**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MAR 29 1996

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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INC., a Pennsylvania corporation,

DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, **Euphemia Butler and Peter Butler**, only and the defendants, **SUN COMPANY, INC. (R&M)**, and **SUN COMPANY INC.**, pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**MAR 29 1996**

IDELL WARD, et al.,

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vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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CASE NO. 94-C-1059-H

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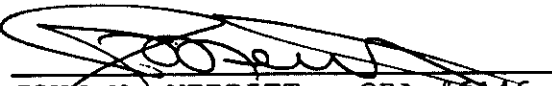
DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Roy Steinhoff-Smith, Carolyn Steinhoff-Smith, Chloe Steinhoff-Smith, Minor, and Phoebe Steinhoff-Smith, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**MAR 29 1996**

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
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DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 94-C-1059-H

ENTERED ON DOCKET


DATE 4-1-96


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Valentino Pina, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsyl-  
vania corporation; and SUN COMPANY,  
INC., a Pennsylvania corporation,

DEFENDANTS.


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Anna Jimison, Allen Jimison, and Marie Michell Jimison, Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-1-96IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**FILED****MAR 29 1996**

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SUN COMPANY, INC., (R&M), a Pennsyl-  
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INC., a Pennsylvania corporation,

DEFENDANTS.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, Billy Hollingshead and Dorothy Hollingshead, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
 JOHN M. MERRITT - OBA #6146  
 Merritt & Rooney, Inc.  
 P.O. Box 60708  
 Oklahoma City, OK 73146  
 (405) 236-2222  
 Attorneys for Plaintiffs

  
 ROBERT P. REDEMANN - OBA #7454  
 Rhodes, Hieronymus, Jones  
 Tucker & Gable  
 2800 Fourth National Bank Bldg.  
 Tulsa, OK 74119  
 Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

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DEFENDANTS.

CASE NO. 94-C-1059-H

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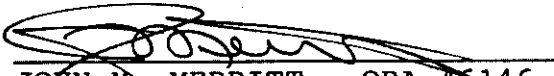
4-1-96

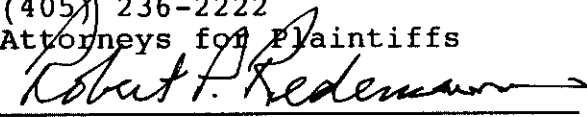
PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Dianna Prescott, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants

DATE 4-1-96

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**MAR 29 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IDELL WARD, et al., )  
 )  
 PLAINTIFFS, )  
 )  
 vs. )  
 )  
 SUN COMPANY, INC., (R&M), a Pennsyl- )  
 vania corporation; and SUN COMPANY, )  
 INC., a Pennsylvania corporation, )  
 )  
 DEFENDANTS. )


CASE NO. 94-C-1059-H


PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, Richard D. Morgan, Jr., Minor, only and the defendants, SUN COMPANY, INC. (R&M), and SUN COMPANY INC., pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

  
JOHN M. MERRITT - OBA #6146  
Merritt & Rooney, Inc.  
P.O. Box 60708  
Oklahoma City, OK 73146  
(405) 236-2222  
Attorneys for Plaintiffs

  
ROBERT P. REDEMANN - OBA #7454  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
2800 Fourth National Bank Bldg.  
Tulsa, OK 74119  
Attorneys for Defendants